Nos. 87-826, 87-1101

In The

Supreme Court of the United States

October Term, 1987

JEROME F. GOLDBERG, ROBERT McTIGUE
and GTE SPRINT COMMUNICATIONS CORPORATION,
Appellants,

v.

ROGER D. SWEET, Director of the Illinois
Department of Revenue, and JEROME COSENTINO,
Treasurer of the State of Illinois,
Appellees.

On Appeal from the
Supreme Court of Illinois

BRIEF OF APPELLANT GTE SPRINT COMMUNICATIONS CORPORATION

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QUESTION PRESENTED

The Illinois Telecommunications Excise Tax Act imposes a tax on "the act or privilege of originating or receiving" long distance telephone calls in Illinois. This tax places a five percent assessment on the entire gross charge for all long distance calls which either begin or end in Illinois and which are charged to an Illinois service address, but regardless of where such charges are billed or paid.

The Illinois statute acknowledges that other states may likewise seek to tax the calls taxed by Illinois. Indeed, several other states and municipalities have already passed taxes on long distance calls originating or terminating and billed or paid for within their boundaries. The Illinois tax provides that any taxpayer who thus pays tax both to Illinois and another state on the same long distance calling activity may obtain an Illinois tax credit. The credit is not measured by the amount of the Illinois tax, however, but by the amount of tax the taxpayer has paid to the state other than Illinois on the same calling activity. Obtaining this credit is contingent upon the taxpayer proving that the other state's tax: (a) has been imposed on the same event taxed by Illinois; (b) is "properly due;" and (c) has already been paid. The statute provides no criteria for determining whether another state's tax covers the same activity covered by the Illinois tax, or for determining when a tax in another state is "properly due."

The Illinois tax also places a five percent assessment on the gross charge for calls which occur entirely within the State of Illinois.

The question presented on this appeal is whether the Illinois tax, as applied to interstate long distance telephone calls as described above, violates the Commerce Clause of the Constitution of the United States.

LIST OF PARTIES AND CORPORATE AFFILIATIONS

A list of the parties to this proceeding is included in the Jurisdictional Statement previously filed by GTE Sprint Communications Corporation ("Sprint Jurisdictional Statement") at ii. A description of GTE Sprint's corporate affiliations, provided pursuant to United States Supreme Court Rule 28.1, was also included in the Sprint Jurisdictional Statement at 1, fn. 1.

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OPINIONS BELOW

The opinion of the Illinois Supreme Court is reported at 117 Ill. 2d 493, 512 N.E.2d 1262 and is reprinted in the Appendix to the Jurisdictional Statement already filed in this Court by Appellants, Jerome F. Goldberg and Robert McTigue, in a related appeal now consolidated with GTE Sprint's appeal. *(Jerome F. Goldberg and Robert McTigue v. Roger D. Sweet, et al.*, No. 87-826 (docketed in the United States Supreme Court Nov. 20, 1987)). Goldberg J.S. App. C at 4a-16a.

The findings and opinion of the Circuit Court of Cook County, Illinois, dated October 22, 1986, are not reported.

A copy of the trial court's findings of fact and conclusions of law is included in Goldberg J.S. App. E at 18a-24a.

JURISDICTION

Appellants Jerome F. Goldberg and Robert McTigue (collectively "Goldberg") sued the Illinois Department of Revenue ("State of Illinois") in the Circuit Court of Cook County, Illinois, challenging the validity of the Illinois Telecommunications Excise Tax Act ("Tax Act") under the Illinois and United States Constitutions. GTE Sprint was named as a nominal defendant and filed a cross-claim against the State of Illinois, also challenging the constitutionality of the Tax Act.[1] The trial court granted motions filed by Goldberg and GTE Sprint for summary judgment, and held the Tax Act unconstitutional, on Commerce Clause grounds.

The State of Illinois appealed directly to the Illinois Supreme Court, which ultimately held the Tax Act constitutional despite the Commerce Clause challenge. The Illinois Supreme Court's judgment was entered on June 24, 1987, and an opinion supporting the judgment was filed on July 27, 1987. On July 15, 1987, GTE Sprint filed a timely petition for rehearing with the Illinois Supreme Court, which petition was denied on October 5, 1987. Sprint J.S. App. B at 6a.

On December 8, 1987, GTE Sprint filed with the Illinois Supreme Court its Notice of Appeal from the June 24 judgment, and on December 31 docketed that appeal here. Sprint J.S. App. A at 1a. This Court noted probable jurisdiction of GTE Sprint's appeal on February 22, 1988. Joint Appendix at 13a ("J.A."). The jurisdiction of this Court rests on 28 U.S.C. § 1257(2) (1982).

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[1] Illinois law affords parties the option of challenging taxes either through administrative or state court proceedings. Illinois State Officers and Employees Money Disposition Act, Ill. Rev. Stat. ch. 127, § 172 (1985). *Shell Oil Co. v. Department of Revenue*, 95 Ill. 2d 541, 449 N.E.2d 65, 66 (1983). Further, GTE Sprint has standing to challenge the Illinois tax under the Commerce Clause. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267 (1984).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Commerce Clause, United States Constitution: "The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States . . . ." Art. I, § 8, cl. 3.

The full text of the Illinois Telecommunications Excise Tax Act, Ill. Rev. Stat. ch. 120, §§ 2001-2021 (1985) is set forth in Goldberg J.S. App. F at 25a-47a.

The relevant texts of several state taxing statutes and municipal ordinances, not directly at issue but referred to in the Sprint Jurisdictional Statement and herein, are included in the Sprint J.S. Appendices, Appendix D through H at 11a-22a and in the Appendices to this brief as Appendix B through E. A summary of selected statutes is included in Appendix A hereto.

STATEMENT OF THE CASE

A. GTE Sprint's Interstate Business and Operations[2]

GTE Sprint Communications Corporation is a retailer of intrastate and interstate telecommunications services. Sprint J.S. App. C at 7a; R. C 756. A large portion of GTE Sprint's business consists of providing paying customers interstate voice transmission services, by telephone, in all fifty states of the United States and in several foreign countries. Sprint J.S. App. C at 7a; R. C 756. In order to provide these services, GTE Sprint has established, over the years and at great expense, its own interstate transmission network comprised of microwave radio, fiber optic, satellite and cable facilities, spread over numerous states. Sprint J.S. App. C at 7a-8a; R. C 756.

In transmitting voice messages on an interstate basis, GTE

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[2] These facts were included in GTE Sprint's verified cross-claim and in an affidavit supporting GTE Sprint's cross-motion for summary judgment. *See* Sprint J.S. App. C at 7a-10a; R. C 116-127, 795-799. These facts have never been challenged by the State of Illinois.

Sprint utilizes its own transmission facilities where possible. However, GTE Sprint must also purchase the services of other telecommunications carriers to complete its transmissions in certain areas its network does not reach. Sprint J.S. App. C at 8a; R. C 756-757.

The total costs GTE Sprint incurs in sending its interstate transmissions stem from several sources -- from the costs of building and maintaining its interstate lines, the costs of sending transmissions over its interstate lines, the cost of purchasing the use of other carriers' lines in states where Sprint has not built lines, and the cost of access charges which must be paid to other carriers to pick up and drop off calls at the local level. Sprint J.S. App. C at 8a-9a; R. C 757. These are costs which GTE Sprint incurs in sending each interstate transmission and which emanate from activities occurring in each of the states involved in the path of the interstate transmission. Sprint J.S. App. C at 8a-9a; R. C 757.

These costs of interstate transmission are recovered by GTE Sprint from its customers in the tariffed prices the customers pay for telecommunications services. The customer's charge for an interstate toll call varies according to duration of the call and the distance between the place the call originates and the place it terminates; the call increases in price both as the duration of the call and the distance between these points increases. The transmission costs to GTE Sprint on long distance calls also increase the farther it must transmit each such call. Sprint J.S. App. C at 9a; R. C 757-758.

GTE Sprint is capable, administratively, of billing more than one state's tax on a single interstate communication. For example, GTE Sprint, in charging for an interstate transmission originating in Illinois and terminating in New York, could include in the charge for that call not only a tax assessed by Illinois, the originating state, but also a tax assessed by New York, the terminating state, as well as any tax assessed by any one state on the call's transmission path. Sprint J.S. App. C at 9a; R. C 758.

GTE Sprint's intrastate telecommunications services are provided pursuant to tariffs authorized by the Illinois Commerce Commission, while its interstate telecommunications services are common carrier services subject to Federal Communications Commission regulation, under 47 U.S.C. §§ 153 (e) and 201 *et seq*. Sprint J.S. App. C at 9a; R. C 758.

B. The Illinois Telecommunications Excise Tax Act

Section 4 of the Illinois Telecommunications Excise Tax Act provides:

> [A] tax is imposed upon the *act or privilege of originating in this State or receiving in this State interstate telecommunications* by a person in this State *at the rate of 5% of the gross charge* for such telecommunications purchased at retail from a retailer by such person.

Goldberg J.S. App. F at 29a; Ill. Rev. Stat. ch. 120, § 2004 (1985) (emphasis added). "Gross charge" is defined as "the amount paid for the act or privilege of originating or receiving telecommunications in this State. . . ." Goldberg J.S. App. F at 25a; Ill. Rev. Stat. ch. 120, § 2002(a) (1985). "Amount paid" is defined under the Act as "the amount charged to the taxpayer's service address in this State *regardless of where such amount is billed or paid.*" Goldberg J.S. App. F at 26a; Ill. Rev. Stat. ch. 120, § 2002(b) (1985) (emphasis added).

Section 4 of the Act contemplates that states other than Illinois will impose taxes on the same interstate calling activity taxed by Illinois and provides the following credit provision for those situations:

> To prevent actual multi-state taxation of the act or privilege that is subject to taxation under this paragraph, any taxpayer, *upon proof that that taxpayer has paid a tax in another state on such event, shall be allowed a credit* against the tax imposed in this Section 4 *to the extent of the amount of such tax properly due and paid in such other state.*

Goldberg J.S. App. F at 29a-30a; Ill. Rev. Stat. ch. 120, § 2004 (1985) (emphasis added).

C. Other Existing Taxes on Interstate Telecommunication Activity

During the past few years, numerous states and municipalities have enacted taxes on interstate telecommunications activity, which taxes are similar to the Illinois tax. A list and summary of some of these statutes is included in Appendix A hereto.

D. The Proceedings Below

Goldberg originally filed this lawsuit against the Illinois Department of Revenue, challenging the constitutionality of the Illinois Telecommunications Excise Tax Act under the United States and Illinois Constitutions. R. C 2. GTE Sprint and other long distance message carriers were named as nominal defendants, being retailers responsible for collecting the tax. GTE Sprint filed a cross-claim against the Illinois Department of Revenue and State Treasurer ("State of Illinois"), challenging the validity of the tax under (*inter alia*) the Commerce Clause of the United States Constitution. R. C 112-127. GTE Sprint simultaneously moved, under Illinois statute, to have an order of injunction entered requiring that the amounts it or its customers paid under the Tax Act be placed into a "protest fund" pending disposition of its tax challenge, to preserve the payments for refund if the Tax Act were ultimately declared unconstitutional. *See* Illinois State Officers and Employees Money Disposition Act, Ill. Rev. Stat. ch. 127, § 172 (1985); R. C 118-123. The trial court granted GTE Sprint's motion. R. C 134. Thereafter, a number of other carriers, including AT&T, MCI and others, filed similar cross-claims and requests for injunctive relief. R. C 192, 228, 275, 335, 365.

On May 2, 1986, the State of Illinois filed a motion for summary judgment, requesting that the court declare the Illinois Tax Act constitutional under both the Illinois and U.S. Constitutions. R. C 654-56. Goldberg and GTE Sprint filed cross-motions for summary judgment, requesting that the tax be declared unconstitutional on the basis of the Commerce Clause. Goldberg also asserted that the tax was void under the Equal Protection Clauses of the U.S. and Illinois Constitutions. R. C 657-59 and

C 728-749; R. C 722-726 and C 755-799.

The trial court ruled against the State of Illinois and in favor of Goldberg and GTE Sprint on their cross-motions for summary judgment. R. C 1044-55; Goldberg J.S. App. E at 18a. The trial court found that the tax triggered Commerce Clause scrutiny, as it taxed interstate phone calling activity, and that it failed three of the four Commerce Clause tests applicable to taxes on interstate activity, as reflected in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The trial court entered an order, accordingly, adding that there was no just reason to delay an appeal, that its judgment should be stayed, and that its injunction order holding the tax payments in the protest fund should stand until final disposition of the suit. Goldberg J.S. App. E at 19a; R. C 1044-1046.

The State of Illinois appealed directly to the Illinois Supreme Court which reversed the trial court's decision. In doing so, the Illinois Supreme Court agreed with the trial court that the tax was assessed against interstate activity, despite the State's arguments that the tax was a local "sales," "use" or "consumption" tax:

> Under [the Tax Act], the taxable event is the "act or privilege of originating or receiving interstate telecommunications by a person in this state" while the amount of the tax is determined by applying a 5% multiplier to the retail purchase price .... Relying on this statutory language, the Director has applied various designations to the tax in issue. For example, the tax has been denominated as a "purchase tax," "a use tax, i.e. use of [a] privilege," "a tax on the privilege or act of using telecommunications within this State," "a consumption tax," and a tax on the "act, or * * * privilege of consuming messages." However, for purposes of ascertaining whether or not commerce clause analysis applies, it is the taxable event and its practical consequences which are critical rather than the name of the tax or the manner which [sic] the tax is measured. [Citations omitted.] Thus, the fact that section 4 establishes the purchase price of an interstate telecommunication as the basis upon which the tax is calculated does not trans-

> form the taxable event into a retail purchase . . . . Since the taxable event in this case is the "act or privilege of originating or receiving interstate telecommunications * * * in this State," it is clear that the taxable event is linked inextricably to interstate activity -- interstate communication. A person simply cannot make or receive an interstate telecommunication without activating and participating in a complex network of interstate transmissions culminating in interstate communication. We believe that such interstate communication is interstate commerce.

Goldberg J.S. App. C at 9a.

Having decided that the tax is assessed on interstate activity, the Illinois Supreme Court concluded that the tax, to stand, must have sufficient nexus with the taxing state, must be apportioned to activity occurring within the taxing state, must not discriminate against interstate commerce and must bear a fair relation to services provided by the taxing state, under the Commerce Clause tests of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Goldberg J.S. App. C at 9a-10a and *passim*. In applying these tests, the court held that the Illinois tax failed two of them, *i.e.*, apportionment and discrimination. The court nevertheless concluded that the tax did not violate the Commerce Clause. Goldberg J.S. App. C at 10a. The Court did so by finding, first, that, although *Complete Auto* required apportionment on interstate taxes, "[a]n unapportioned tax . . . is not necessarily invalid," if it avoids imposing a risk of multiple taxation on the same activity. Goldberg J.S. App. C at 11a. As to its finding that the tax discriminates against interstate commerce by imposing actual multiple burdens, the court found that this admitted discrimination was cured by the tax's credit provision, with no discussion or examination of the credit's operation. Goldberg J.S. App. C at 13a.

The court finally found that the tax was fairly related to services provided by the State. The court acknowledged that a disparity existed between the scope of the tax's revenue reach and the extent of services provided by the state as "the State is taxing the 'gross charge' for the entire interstate telecommunication even though the benefits it affords are limited to that portion of the communication occurring within the State." Goldberg J.S. App. C at 13a. Nevertheless, the court found that Illinois hosted "the most critical step in the taxable event -- interstate origination," so that the Illinois tax on the entire charge for the interstate service was "fairly related" to services provided by Illinois. Goldberg J.S. App. C at 13a. The Illinois Supreme Court concluded, in this fashion, that the Illinois tax "passed" all the *Complete Auto* tests and "is [therefore] valid under the commerce clause." Goldberg J.S. App. C at 14a.

E. GTE Sprint Payments under the Tax Act

Under Section 5 of the Tax Act, the ultimate consumers of telecommunications services are liable for payment of the tax, though retailers of those services are held equally liable, whether or not they actually collect the tax. Goldberg J.S. App. F at 30a; Ill. Rev. Stat. ch. 120, § 2005 (1985). From about September 15, 1985 to July, 1986, GTE Sprint paid to the State of Illinois approximately $2,200,000.00 in taxes allegedly due the State under the Illinois Telecommunications Excise Tax. R. C 798. At least $400,000.00 of this amount Sprint paid itself, rather than collecting it from its customers. R. C 798; Sprint J.S. App. C at 10a. As of June 30, 1987, Sprint and its customers had jointly paid into the protest fund approximately $2,431,743.76 in taxes under the Tax Act. R. C 1569-1570 and R. C 1609.

INTRODUCTION AND SUMMARY OF ARGUMENT

A state tax that is imposed on interstate activities must submit to Commerce Clause scrutiny, to assure that the exertion of the state's taxing power will not unduly hinder or impede the free flow of commerce. There could scarcely be a tax more in need of scrutiny under the Commerce Clause than the Illinois tax on interstate telecommunications since such communications represent quintessential and unified interstate activity. But when Commerce Clause scrutiny is applied, it is also apparent that there could scarcely be a tax more deficient in properly limiting the state's taxing powers under the Commerce Clause, as the tax is not fairly apportioned to activity occurring in Illinois, it

discriminates against interstate commerce and it is not fairly related to services provided by Illinois. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

I.

The Illinois tax clearly taxes integral interstate activity. The tax lays a five percent assessment on the entire gross charge for 'originating or receiving' long distance telephone calls in Illinois. Since interstate transmission is the very predicate and concomitant necessity of 'originating or receiving' an interstate telephone call, the object of the tax is interstate calling or transmission activity. This conclusion is so obvious that, in interpreting the tax, both lower courts found that the taxable event under the Tax Act *is* interstate commerce.

Both common law and Commerce Clause construction principles support the state courts' interpretation of the statute. Although the State of Illinois argued that the tax taxes an instate event, such as the local sale, origination, receipt or consumption of the phone call, neither the plain terms of the statute nor the practical effect of the tax support such an interpretation.

First, given the plain meaning of the Tax Act's terms, it cannot be read as a tax on purely local activity. Though the State of Illinois ("State") argued that the tax is a local "sales" tax on the purchase of calls, for example, the only reference to "purchase" in the statute is in a clause, subordinate to the main taxing clause, which identifies the tax base as the gross charge for calls "purchased at retail." But this mere specification of the tax base does not convert the tax on the privilege of engaging in interstate communication into a local sales tax. The Tax Act also clearly states that, although the tax is limited to calls charged to an Illinois address, the tax applies even when calls are billed or paid for outside the state; thus, the tax is assessed even where significant incidents of sale activity occur *outside* the state. Moreover, even if the tax *were* limited to calls "sold" within the state, its practical effect would be to tax interstate call activity. *Central Greyhound Lines, Inc. v. Mealey*, 266 A.D. 648, 44 N.Y.S.2d 652, 654 (App. Div. 1943), *aff'd*, 296 N.Y. 18, 68 N.E.2d 855 (1946), *rev'd*, 334 U.S. 653 (1948); *see also Maryland v. Louisiana*, 451 U.S. 725, 755-56 (1981) (assessing a tax on the sales receipts from interstate activity cannot transform a tax on that interstate activity into a local sales tax).

Neither do the plain terms or practical effect of the tax permit it to be construed as one on the entirely local origination, receipt or consumption of interstate transmission services. The local enjoyment of an interstate transmission cannot exist without the simultaneous use of facilities, network, equipment, and operations that are out-of-state. Thus, Illinois cannot "carve out" of this unified interstate process its allegedly local contacts with it, and claim to be taxing only the latter, because the "local" events are part and parcel of that interstate process. *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 167 (1954); *Maryland v. Louisiana*, 451 U.S. 725, 754-56 (1981). In sum, the Illinois tax should be construed as taxing interstate activity under applicable construction principles, especially as the origination and receipt of interstate messages has been defined, in other legal contexts, as interstate activity. *Central Greyhound*, 334 U.S. at 659 (definitions in the context of constitutional interpretation should be consistent with treatment in other legal contexts).

II.

Any state tax on interstate activity, including the Illinois tax, must be limited to that portion of the interstate activity that occurs within the taxing state. Such apportionment assures that each state receives only its fair share of revenue from an interstate activity, and prevents unfair burdens arising from more than one state taxing the same or parts of the same activity. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). The Illinois tax, however, is in no way related to that portion of interstate calling activity that occurs in Illinois. Instead, Illinois taxes the entire gross charge for the call, despite the fact that other states have contacts with and support such call activity and are also entitled to tax it. Indeed, both state courts below found that the tax is unapportioned -- and precedent from this Court

confirms that such an unapportioned tax laid on the full gross charge for an interstate transmission is invalid. *See Central Greyhound*, 334 U.S. 653, 662-63 (1948).

The State has argued, nevertheless, that the tax is apportioned, being limited to calls either charged in Illinois or involving an Illinois participant. But these limits do not apportion the tax, as application of this Court's recent "internal" and "external consistency" tests for apportionment formulas reveals. *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159 (1983). For example, under the internal consistency test, a tax must be such that application of a like tax in another state would not result in duplicative taxation. But, if another state imposed a tax like the Illinois tax -- *e.g.*, a tax on long distance calls which originate or terminate and are billed or paid for in this other state -- it is clear that calls between Illinois and this state could be taxed by both. There is no doubt that this other state would have an equal right to assess such a tax because, in its contacts and support of interstate activity, it is indistinguishable from Illinois. Indeed, by taxing the full stretch of calls based on contacts which can be matched by other states on the call's transmission path, Illinois has attempted to *allocate* to itself all effective revenues from the calls, an approach which has met with the disapproval of this Court. *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 444-46 (1980).

Likewise, the Illinois tax fails the external consistency test for apportionment. External consistency requires that factors used in a tax to divide receipts attributable to instate activity, which is taxable, from receipts attributable to out-of-state activity, which is not taxable, must actually reflect a reasonable sense of how such receipts are generated. *Container*, 463 U.S. 159, 169 (1983). It is uncontested that the gross charge for an interstate call is generated not only by the use and cost of Illinois facilities, but by the use and cost of significant out-of-state network and facilities as well. The Illinois Act simply ignores these other states' contributions to the generation of the call charge or receipts from it, however, because limiting the tax to calls

charged to an Illinois address still does not adequately confine the tax to that portion of interstate calling charge attributable to Illinois transmission activity and costs. The "limits" in the Illinois tax are economically and constitutionally arbitrary ones, insufficient to validate it. The tax therefore fails the external consistency test.

The Illinois Supreme Court recognized that the Illinois tax was unapportioned, but concluded that the tax was constitutional by holding that a tax on interstate activity need not be apportioned if it avoids discrimination. The court's holding was in error, however, ignoring precedent from this Court which demonstrates that (a) though non-discrimination is a necessary condition for the constitutionality of a tax, it is not sufficient; and (b) a tax's failure to apportion constitutes discrimination in itself. In any event, eschewing the apportionment requirement in this case produces a pernicious result, given that states other than Illinois have an equal right to tax their portions of interstate calls. The tax should therefore be invalidated on apportionment grounds.

III.

The Commerce Clause assures free trade among the states and prohibits one state from interfering with the taxing powers of another. Pursuant to this principle, a tax may not discriminate against interstate goods or services, regardless of whether the burden of that discrimination falls on instate or out-of-state consumers. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 328 (1977); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268-69 (1984). However, the Illinois tax seriously discriminates against interstate telephone services in two ways: First, it creates potential and actual multiple taxation of interstate calls, while instate calls are not subject to such a burden and, second, it effectively taxes interstate calling more heavily than intrastate calling.

This Court has recently affirmed that taxes which create even the risk of multiple taxation on the same interstate activity are unconstitutional. *Armco Inc. v. Hardesty*, 467 U.S. 638,

644-45 (1984). The Illinois tax unquestionably poses a risk of multiple taxation. For example, whereas the Illinois tax applies to calls originating or terminating in Illinois and *charged* to a service address there, another state could tax calls originating or terminating there which are *billed or paid for* in that state. Thus, a call made between Illinois and the second state, which is charged to an Illinois address but is billed to or paid by a party in the second state, would be subject to both states' taxes.

Even more significant is the fact that existing taxes in other states, taken together with the Illinois tax, demonstrate that *actual* multiple taxation of long distance calls currently exists. For example, the State of Washington taxes long distance calls originating or terminating there, if the calls are billed or paid for within that state. Consequently, if a call originates in Illinois and is charged to an Illinois address, and terminates in Washington and is billed or paid there, the same call would be taxed by both states (*e.g.*, where a call is made from and charged to an Illinois office of a corporation headquartered in Washington, when headquarters pays the bill). Other states have passed taxes similar to the Washington tax.

Numerous states have also passed taxes on access charges which are the charges long distance carriers pay to the local operating companies for use of local lines to originate or complete interstate calls. Since these portions of interstate transmission represent parts of the same transmission already taxed by Illinois, the taxation by Illinois of the phone call and the taxation by other states of the access charges also constitutes overlapping taxation, even though the two taxes are assessed on different persons or entities. *Telegraph Co. v. Texas*, 105 U.S. 460, 465 (1881) (issue is whether same activity has been taxed more than once, regardless of who bears the burden). The Illinois tax, as applied in conjunction with these other taxes, thus produces multiple taxation of the same call activity. *See* summary of taxes in Appendix A hereto.

Indeed, although the Illinois Supreme Court concluded, erroneously, that the Illinois tax does not create multiple taxation

with regard to calls that *originate* in Illinois -- it acknowledged that the Illinois tax does pose multiple tax burdens on calls that *terminate* in Illinois. This conclusion is sufficient in itself to invalidate the tax. *Armco*, 467 U.S. at 645 ("[i]f another State has taxed the same interstate transaction, the burdensome consequences to interstate trade are undeniable").

The Illinois Supreme Court ultimately upheld the tax, however, by resorting to the tax's credit provision as the supposed "cure" for the tax's admitted apportionment and discrimination ailments. Under the credit provision, a taxpayer subject to two or more taxes on the same calling activity may obtain an Illinois tax credit in the amount of the other state's tax, if the taxpayer demonstrates that it has paid the other state's tax, that the other state's tax was "properly due," and that the other state's tax covered the same activity covered by the Illinois tax. This mechanism fails altogether to apportion the tax and eliminate its discriminatory effect, however.

First, if another state taxes a call taxed by Illinois, and that state tax is less than the absolute amount of the Illinois tax, a taxpayer will continue to pay two states' taxes on the same call, even after the credit, though the Illinois tax will be reduced. This reduction does not eliminate discrimination, however, since the post-credit division of tax between the two states will have no relationship whatsoever to the actual amount of transmission activity which occurs in the two respective states; duplicative taxation persists -- and without apportionment. Indeed, the discrimination effected by the Illinois tax would be eliminated only when the other state's tax *happens* to equal or exceed the amount of the Illinois tax, so that the Illinois tax is entirely cancelled. Such a "cure" is fortuitous and cannot, therefore, validate the tax. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963) (Brennan, J., concurring).

Second, even if the credit could eliminate discrimination, the requirements it places on the taxpayer to do so reintroduce discrimination to the tax. Specifically, a taxpayer subject to two taxes must prove that the other state's tax is "properly due"

and that the two taxes cover the same activity. Given the lack of any criteria for such proofs in the statute, and the fact that such proofs appear to be legal in nature and of a difficulty as to challenge even this Court, the burden placed on the taxpayer to cure the inherent discrimination of the tax constitutes, in itself, a burden on interstate commerce. This is especially true here, where the events taxed constitute pervasive and everyday activity and the need for the credit mechanism will be frequent and great.

The Illinois Supreme Court also suggested that the tax on interstate calls might be defended as non-discriminatory, simply because the Illinois Tax Act places a five percent tax on both inter- and intrastate calls. But, just last term, this Court stated that the Commerce Clause is offended by taxes which, though facially equal, operate to discriminate against interstate commerce. *American Trucking Associations, Inc. v. Scheiner*, 107 S. Ct. 2829 (1987). Here, the Illinois tax, although apparently even-handed, is far from it, for the very reasons cited in *American Trucking*. Specifically, since interstate transmission uses instate facilities with far less frequency than do instate transmissions, an "equal" tax applied to the two falls on the interstate transmissions more heavily. Similarly, the Illinois tax on interstate calls cannot be deemed a tax which compensates somehow for the tax on intrastate calls, because the interstate calls do not involve Illinois services and support to the extent intrastate calls do. The Illinois tax, which falls disproportionately on interstate calling, thus discriminates against interstate commerce, despite the facial equality of the tax. *Maryland v. Louisiana*, 451 U.S. 725, 759 (1981); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 331 (1977).

IV.

The Illinois tax fails the final *Complete Auto* test because the tax is not related to the services provided the taxed activity by Illinois. Under the fair relation test, the measure of a tax must be reasonably related to the extent of contact the taxed activity has with the taxing state and, in this regard, the incidence of the

tax as well as its measure must be tied to the earnings which the taxing state has made possible. *Commonwealth Edison v. Montana*, 453 U.S. 609, 626 (1981). However, the measure of the Illinois tax is not tied to the earnings or charges that Illinois has made possible with regard to interstate calling. Illinois taxes the entire gross charge for any interstate call, even though it is clear that not all of that charge has been generated by activities within Illinois. In this respect, the Illinois tax strongly resembles the flat privilege tax on inter- and intrastate carriers struck down last term in *American Trucking* where the Court held, as it should here, that a flat tax on the privilege of engaging in interstate and intrastate activities is unconstitutional because the intrastate activity will exercise the privilege accorded by the taxing state fully, while the interstate activity will frequently forego the privilege because it utilizes such privileges intermittently. *American Trucking*, 107 S. Ct. at 2844. Indeed, the Illinois tax is even more insidious than the flat privilege tax in *American Trucking* because the Illinois tax -- being applied to a gross charge which increases the longer a call is and the more it involves interstate activity -- *increases* in amount as the activity which takes place in Illinois *decreases*. There is no doubt, then, that the measure of the Illinois tax is in no way tied to Illinois activity or the earnings which Illinois makes possible. The tax therefore fails the final Commerce Clause test.

ARGUMENT

I. The Illinois Tax Is Applied to Interstate and Not Local Activity, as the Illinois Supreme Court Held

The Illinois Tax Act taxes quintessential interstate activity. The tax "is imposed upon the act or privilege of originating in [Illinois] or receiving in [Illinois] interstate telecommunications." Goldberg J.S. App. F at 29a; Ill. Rev. Stat. ch. 120, § 2004 (1985). Since interstate transmission is the very predicate and concomitant necessity of "originating or receiving" a long distance telephone call, the object of the tax is plainly interstate in nature. Indeed, this conclusion is so apparent that neither court below had any difficulty in construing the taxable event of the

Tax Act as interstate calling activity. Goldberg J.S. App. C at 9a; Goldberg J.S. App. E at 20a-22a. As the Illinois Supreme Court stated:

> Since the taxable event in this case is the "act or privilege of originating or receiving interstate telecommunications * * * in this State," it is clear that the taxable event is linked inextricably to interstate activity -- interstate communication. A person simply cannot make or receive an interstate telecommunication without activating and participating in a complex network of interstate transmissions culminating in interstate communication. We believe that such interstate communication is interstate commerce.

Goldberg J.S. App. C at 9a. This Court should adopt this construction, as it is supported by every relevant state and constitutional rule regarding the construction of taxing statutes.

A. The Illinois Supreme Court's Interpretation of the Taxable Event as Interstate Activity Follows Proper Construction Principles

It is a fundamental canon of statutory construction in Illinois, as elsewhere, that the language of a statute should be given its plain and ordinary meaning. *Franzese v. Trinko*, 66 Ill. 2d 136, 361 N.E.2d 585, 587 (1977). The ordinary meaning of the terms of the Tax Act demonstrate that the taxable event is interstate activity. For example, although the State maintained below that the origination/receipt/use/consumption of interstate calls were discrete, local events which could be fully taxed by Illinois, this assertion defies the ordinary sense of the described taxable event since the "privilege of originating or receiving interstate telecommunications" is utterly dependent upon concomitant interstate transmission activity. Although the sender, receiver or "consumer" of a long distance call may be located in Illinois, his or her initiation, receipt or consumption of the call cannot be divorced from or exist without interstate activities, facilities and transmission. *See* discussion *supra* at 17-18. The local and interstate aspects of the transmission activity are a unified whole.

The plain meaning of the statute also belies the State's assertion below that the taxable event under the Tax Act is the local "sale" of the interstate calling service. The direct object of the main taxing clause in Section 4 is "the act or privilege of originating in [Illinois] or receiving in [Illinois] interstate telecommunications." Goldberg J.S. App. F at 29a. The only reference to "purchase" is not in this main taxing clause, but in a subordinate one, where the five percent multiplier is applied against the "gross charge" for the call, which call is defined as one "purchased at retail." Goldberg J.S. App. F at 29a; Ill. Rev. Stat. ch. 120, § 2004 (1985). The purchase language thus does nothing more than reflect that the tax base will consist of gross charges derived from retail sales.

The definitional portions of the statute positively rebut any reading of the taxable event as a *local* sale, in any event. The statute provides that the five percent multiplier of the tax is to be applied against the "gross charge" for long distance calls, which charge is defined in the statute as "the amount paid" for interstate message services, "amount paid" being subsequently defined as "the amount charged to the taxpayer's service address in Illinois *regardless of where such amount is billed or paid.*" Goldberg J.S. App. F at 25a-26a; Ill. Rev. Stat. ch. 120, § 2002(b) (1985) (emphasis added). A tax is thus assessed against a charge for an Illinois long distance call regardless of whether the charge is billed or paid for in Illinois. Therefore, the tax cannot be deemed "local," even if labeled a "sales tax," because the tax, by its terms, is plainly not confined to sales which occur entirely instate.

B. Commerce Clause Principles Dictate that the State Court's Interpretation of the Taxable Event as Interstate Activity Be Adopted

This Court will defer to the interpretation placed on a state taxing statute by the court of the taxing state, if no reason exists to disapprove it. *United Air Lines v. Mahin*, 410 U.S. 623, 629 (1973). Here, there is every reason for this Court to defer to the Illinois courts' conclusion that the taxable event under the Act is

interstate activity, as such a construction conforms completely to constitutional principles applicable to the interpretation of state taxing statutes.

1. The Practical Effect of the Tax Is To Tax Interstate Calling Activity

In evaluating taxes under the Commerce Clause, this Court has consistently held that it is the practical and economic effect of the tax which governs the determination of whether the tax is interstate in nature, so as to trigger constitutional scrutiny. *Maryland v. Louisiana*, 451 U.S. 725, 756 (1981) (the "practical operation" of a tax controls in assessing its constitutionality); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288-89 (1977); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 69-70 (1963). Here, it is clear that the Illinois courts correctly adhered to this principle, in construing the taxable event under the Illinois tax as interstate activity. As the trial court aptly stated:

> [T]he state asks the Court to focus on one-half of what goes on during [an interstate phone call], that is, the originating or receipt of a phone call . . . .
>
> * * *
>
> To my view it strains both common knowledge and common sense to characterize an interstate phone call in terms of an Illinois sale at retail and thereby *ignore the realities* of its interstate participant and the interstate communication system over which it has taken place.

R. C 1048-1049, C 1050; emphasis added. Likewise, the Illinois Supreme Court relied on the practical thrust of the tax:

> Thus, the fact that section 4 establishes the purchase price of an interstate telecommunication as the basis upon which the tax is calculated does not transform the taxable event into a retail purchase which, by definition, is local. . . . Since the taxable event in this case is the "act or privilege of originating or receiving interstate telecommunications * * * in this State," it is clear that the taxable event is linked inextricably to interstate activity -- interstate communication. A person simply cannot make or receive an interstate telecommunication without activating and participating in a complex network of interstate transmissions. . . .

Goldberg J.S. App. C at 9a.

This Court's analysis of the practical effect of taxes similar to the Illinois tax demonstrates that the courts below were correct in these holdings. For example, this Court has refused to deem taxes "local" by focusing on the taxpayer, rather than on the subject of a tax. In *Telegraph Co. v. Texas*, 105 U.S. 460 (1881), the Alabama state court had construed a tax as a constitutionally valid, local "occupation" tax on a telegraph company that sent and received interstate messages. However, since the tax was assessed as a percentage of receipts for all messages transmitted or received, this Court concluded that, as a practical matter, the tax fell on the interstate message activity itself, not on the local occupation of the telegraph company, holding:

> [W]here the burden of a tax falls on a thing which is the subject of taxation, the tax is to be considered as laid on the thing rather than on him who is charged with the duty of paying it into the treasury. . . .

105 U.S. at 465. Similarly, the Illinois Tax Act, as drafted, is assessed on gross charges for interstate calling activity, and the burden of the tax clearly falls on that interstate calling activity rather than any local activity of the taxpayer.[6]

This Court has also refused to deem taxes local in nature by isolating and focusing on some discrete aspect of interstate activity which is part of a unified and continuous interstate flow. For example, in *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 167 (1954), an interstate gas pipeline operator challenged an "occupation" which was tax levied on

[6] As the trial court found:

> *The relevant inquiry is* as to just *what is being taxed and not who is* being taxed and when that inquiry is made as to these calls, it is apparent that what is being taxed is the interstate phone call.

Goldberg J.S. App. E. at 21a; emphasis added.

the "...'taking' [of gas stored within the State] into [the taxpayer's] pipelines ... solely for interstate transmission ...," and that was assessed on the entire volume of the gas to be transmitted. Although the State maintained that the statute should be construed as taxing the *wholly instate loading* of the gas into the interstate pipeline, this Court, looking to the practical effect of the tax, disagreed, concluding that a mere "aspect of interstate transportation" cannot be "carve[d] out [for local taxing] from what is an entire or integral economic [interstate] process ... [t]he separation must be realistic. ..." 347 U.S. at 166, 169. *Accord Maryland v. Louisiana*, 451 U.S. 725, 754-56 (1981) (tax on "first use" or processing of natural gas brought from outside the state taxed the interstate flow of gas, even though local events might interrupt it). Similarly, the mere origination or termination in Illinois of a unified interstate transmission cannot transform a tax on that activity into a local one.

This Court has also refused to view a tax on interstate services as taxing a local event simply because sales receipts from the provision of those services are collected in the taxing state. Contrary to the State's argument below, the Illinois tax is not one which is limited to calls purchased or receipts collected in Illinois, since the tax covers calls regardless of whether such calls are billed or paid for in Illinois. However, even if the Illinois tax *were* so limited, it still could not be deemed a tax on purely local activity. For example, *Central Greyhound Lines, Inc. v. Mealey* involved a New York tax on gross receipts collected by a bus company for transportation between two points within the state but partially routed through New Jersey and Pennsylvania. This Court treated the tax as applied to interstate activity, even though the transportation began and ended and the receipts for the same were collected within the taxing state. *Central Greyhound*, 266 A.D. 648, 44 N.Y.S.2d 652, 654 (App. Div. 1943), *aff'd*, 296 N.Y. 18, 68 N.E.2d 855 (1946), *rev'd*, 334 U.S. 653 (1948).

Similarly, in *Western Union Telegraph Co. v. Alabama State Bd. of Assessment*, 132 U.S. 472 (1889), the Alabama Supreme Court had construed a tax on gross receipts from interstate telegraph and telephone message services as taxing only local activity because "all receipts derived from business done in the State, [are] *actually received there*, though the message may have been delivered at, or may have been sent for delivery from, some office out ... of the State." 132 U.S. 472, 474 (1889) (emphasis added). This Court reversed, holding that the tax was laid "upon receipts properly appurtenant to interstate commerce," and so constituted a tax on interstate activity. 132 U.S. at 476. *Accord Maryland v. Louisiana*, 451 U.S. 725, 755-56 (1981) (fact of sale within the state does not convert activity involving interstate flow into local event, for Commerce Clause purposes, citing *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U.S. 498, 503-504 (1942)). Likewise, here, the Illinois tax, even if it were limited to receipts *collected* or services *purchased* in Illinois, must be deemed a tax on interstate activity.

2. The Subject of the Tax Should Be Considered Here, as Elsewhere, Interstate Activity

The activity taxed by the Illinois Tax Act has been consistently treated as interstate commerce in the context of other legal relations. For example, the taxed calling activities have been generally deemed common carrier services subject to Federal Communications Commission regulation, because they constitute "interstate commerce."[7] To treat the taxed activity here

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[7] *Cf. Idaho Microwave, Inc. v. F.C.C.*, 352 F.2d 729, 732 (D.C. 1965) (Common carrier of microwave transmissions service sought to avoid requirements under statute, under exemption for *intra*state communication service. Carrier maintained it qualified for exemption because its facilities were all located in one state. The court rejected the argument, noting that, though the carrier's facilities were located in one state, its service was to provide communications among different states and, even if conducting merely an instate relay, service must be deemed "interstate commerce"). *See also Ward v. Northern Ohio Telephone Co.*, 300 F.2d 816, 819 (6th Cir.), *cert. denied*, 371 U.S. 820 (1962) (Federal Communications Act requires telephone companies to furnish

(Footnote continued on the following page)

differently, then, for constitutional purposes, would violate this Court's teaching in *Central Greyhound Lines, Inc. v. Mealey* that: "[t]o label [activity] across [state lines] 'local commerce' for some purposes when it is 'interstate commerce' in other relations . . . is to use loosely terms having connotations of constitutional significance. * * * Especially in the disposition of constitutional issues are [such] legal fictions hazardous, because of the risk of confounding users and not merely readers." 334 U.S. 653, 659 (1948). To avoid such a hazard, activity taxed by Illinois under the Tax Act should be considered here, as elsewhere, interstate commerce.

II. The Illinois Tax on Interstate Calling Activity Violates the Commerce Clause

This Court has long viewed the Commerce Clause not only as a grant of Congressional power over interstate activities and instrumentalities, but also as a limit on the states' power to interfere with such activities and entities. *American Trucking Associations, Inc. v. Scheiner*, 107 S. Ct. 2829, 2838 (1987). In order to assure that the exertion of state taxing power will not unduly hamper the flow of interstate commerce, the Court has thus required that state taxes on interstate activity be assessed (a) only on that portion of the activity which occurs within the taxing state; (b) in a manner which avoids discrimination against interstate commerce; and (c) so as to fairly relate the tax to services provided by the taxing state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977); *see also Maryland v. Louisiana*, 451 U.S. 725, 754 (1981). The Illinois tax on interstate activity meets none of the foregoing three requirements.

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7 *(continued)*

wire service to radio stations. The telephone company here refused to do so, on the ground that it was not in interstate commerce, as its facilities were located instate. The court rejected this position because the telephone lines were to be used for the (instate) beginning and end of the interstate transmission: in "furnishing . . . [of] wires for broadcast purposes, [the phone company] is engaged in interstate commerce").

A. The Tax Violates the Commerce Clause because It Is Not Apportioned

1. The Tax Is Not Apportioned to Activity Occurring within Illinois

To pass Commerce Clause inspection, a tax on interstate activity must be apportioned to that segment of the interstate activity which occurs within the taxing state. *Armco Inc. v. Hardesty*, 467 U.S. 638, 644 (1984); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977); *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 662-63 (1948). The Illinois tax, however, is not even purportedly limited to that portion of interstate calling activity which occurs in Illinois. Instead, the Illinois tax taxes the entire gross charge for an interstate call, even though the charge is generated in part by significant activities outside the state. As the Illinois Supreme Court found, "[s]ince the instant tax applies to the entirety of [the gross charge for] each and every interstate telecommunication, it is not an apportioned tax." Goldberg J.S. App. C at 10a (emphasis added).

Applicable precedent confirms the tax is unapportioned. In *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 662-63 (1948), this Court held that the New York tax laid on gross receipts from interstate bus transportation would be void under the Commerce Clause, unless it were limited to the percentage of the gross receipts equal to that proportion of the total multistate transportation mileage that occurred in New York. The unapportioned Illinois tax at issue here is likewise invalid because it is in no way limited to a percentage of the interstate call charges which corresponds to that portion of interstate telephone transmission activity occurring in Illinois.

2. The Tax Does Not Include a Formula or Method for Apportionment

Recent discussion of apportionment by this Court underscores the invalidity of the Illinois tax. In *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159 (1983), the Court examined a corporate franchise tax which was applied to income from "unitary" interstate business and which included an

apportionment formula for determining that segment of income which could constitutionally be attributed to -- and therefore taxed by -- the taxing state. The Court held that the formula, to be valid, must be "fair," that is, it must possess "internal" and "external consistency:"

> [Where a tax is applied to interstate activity] a State must . . . apply a formula apportioning the income of that business within and without the State. Such an apportionment formula must, under both the Due Process and Commerce Clauses, be fair. [Citations omitted.] The first, and again obvious, component of fairness in an apportionment formula is what might be called internal consistency -- that is, the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business' income being taxed. The second and more difficult requirement is what might be called external consistency -- the factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated.

Container, 463 U.S. at 169. Examining the Illinois tax, it is clear that the tax contains no formula which even vaguely meets these apportionment criteria.

a. The Tax Contains No Apportionment Formula under the Internal Consistency Test because Like Taxes Allow Duplicative Taxation of the Same Calls

Container requires that the apportionment formula of a tax on unified interstate activity be such that, if applied by other states, it would not result in the taxed activity being taxed more than once. In *Armco Inc. v. Hardesty*, this Court more recently applied this "internal consistency" test to a gross receipts tax on interstate activity, by inquiring whether the imposition by another state of a "*like* tax," with a like formula, would result in the activity being taxed by more than one state. 467 U.S. 638, 644-45 (1984) (emphasis added) (citing *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963) (testing a tax by

calculating effect if "*similar* . . . tax structures were adopted in other states")).

Applying this test, it is clear the Illinois tax is not apportioned. If a tax "like" the Illinois tax, *i.e.*, one on calls originated or received in a state, were enacted in other states, then more than one state could tax a long distance call. For example, Illinois taxes the gross charge for long distance calls originating or terminating there. However, the taxing state on the opposite end of the call could, under this same tax, tax the activity already taxed by Illinois. And, since Illinois taxes the entire gross charge for the call, the other state's tax would perforce result in duplicative or overlapping taxation. There are many other conceivable like taxes which would work the same result. *See* discussion *infra*, at 34-38. The Illinois tax therefore fails the internal consistency test.

The State maintained below that the Illinois tax did possess internal consistency since, if every state were to apply a tax *identical* to the Illinois tax -- that is, on long distance calls originating or terminating and "purchased" in the taxing state -- only one state could tax each long distance call, *i.e.*, the state of purchase. This argument totally misapprehends the apportionment concept and the role of "internal consistency."[8] For example, if every state passed a tax *identical* to the Illinois tax, it is true only one state would tax a long distance call (*i.e.*, the "charging" state) but, then, other states which host and economically support significant transmission, billing and purchase activity on that call would be deprived of revenues based on those activities. *See* Statement of the Case at 3-4. There would simply be no apportionment of the tax among the states where substantive interstate transmission or calling activity occurs, even though there might be no technical tax overlap.

Indeed, the approach the State espouses is nothing more

[8] The State's argument is also premised on the false assumption that the Illinois tax is limited to calls purchased in Illinois. It is not. The Illinois tax is limited to calls charged to an Illinois service address, but is applied even where calls are billed or paid for in other states.

than an arbitrary allocation of all revenues from an interstate activity to one state having partial contact with it. However, just recently, this Court frowned upon interstate taxation by allocation -- precisely because awarding exclusive power to one state to tax interstate activity deprives other states supporting that activity of their fair share of revenues. *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 444-446 (1980); *Container*, 463 U.S. 159, 164 (1983).[9] In *Mobil Oil*, the Court further suggested that the allocation approach is problematic, inasmuch as endorsing it could be tantamount to proscribing apportionment altogether, since an apportionment formula (applied by one state) would operate together with an allocation formula (applied by another) to produce forbidden multiple taxation. *Mobil Oil*, 445 U.S. at 444-46. Endorsement of a true apportionment formula, by contrast, is far preferable because it provides the states with latitude to draft different types of taxes on interstate calling activity, allows all states having contacts with the calling activity to obtain a share of revenues from it, and automatically prevents each state from seriously encroaching on the taxing territory of the other, guaranteeing an area of free trade among the states. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 328 (1977).

An "apportionment" test which cares only for avoiding technical duplicative taxation is not enough, then, because such a litmus test does not prevent one state from interfering with the taxing powers of another. Illinois has no right to tax the full stretch of interstate calls beginning and ending there because there are other states which have equal substantive contacts

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[9] The Court in *Mobil Oil* went so far as to state that there is little reason for taxation by allocation, even in its traditional context, *i.e.*, taxation of intangible property. *Mobil Oil*, 445 U.S. at 444-445. Indeed, the states have largely rejected the allocation approach in taxing income from sales of interstate manufacturing (for example), opting, instead, for either apportionment or separate accounting approaches. W. Hellerstein, *State Income and Taxation*, 79 Michigan L. Rev. 113, 116-17 (1980) (and sources cited therein).

with those calls. And its rights are not improved by its having been first to do so. As Justice Goldberg commented in his dissent to *General Motors Corp. v. Washington*, 377 U.S. 436, 458 (1964), "[p]resumably, if there is to be a limitation on the taxing power of each . . . [state], that limitation surely cannot be on a first-come-first-tax basis." The more reasoned and better test is the application of *like* taxes, as recommended in *Armco*, which recognizes that state contacts with interstate activity may appear to differ, yet be "like" in the sense that they provide an equal and similar basis for a tax -- and that this must be taken into the constitutional "duplicative taxation" account.

Applying taxes "like" the Illinois tax in other states, then, it is apparent that more than one state can tax the interstate calling activity taxed by Illinois. For example, other states have already passed taxes that cover calls which originate or terminate within their boundaries and which are, in some manner, billed or paid there.[10] The billing contacts on which these types of taxes are based are substantively the same as the charge contact used by Illinois, so the taxes are highly similar to the Illinois tax. But imposition of these similar taxes results in multiple taxation of calls between Illinois and these states because calls which are *charged* to an Illinois address but are *billed or paid* for in these other states may be taxed by both Illinois and these other jurisdictions. The Illinois tax thus fails the internal consistency test, as correctly applied.

b. The Tax Contains No Apportionment Formula under the External Consistency Test because It Covers the Full Gross Charge for Calls, though Much of that Charge Is Generated by Costs and Economic Activity Outside the State

The Court's holding in *Container* also requires that a tax on interstate activity pass what it termed the "external consis-

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[10] *See* taxes imposed, *e.g.*, by Arkansas, New Mexico, Ohio, and Washington, as cited in Appendix A hereto.

tency" test. To have external consistency, the factors used in the tax to divide income attributable to instate activity, which is taxable, from income attributable to out-of-state activity, which is not taxable, "must actually reflect a reasonable sense of how [the tax base] is generated." *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159, 169 (1983). However, uncontested evidence shows that the gross charge for an interstate call is generated not only by the use and cost of Illinois facilities, but by the use and cost of significant out-of-state network and facilities as well. *See* Statement of the Case at 3-4. The Illinois tax is nevertheless assessed against the entire gross charge for a long distance call, there being no attempt to divide the gross charge, according to a realistic sense of how it is generated, between instate and out-of-state activity. As a consequence, the Illinois tax has no "external consistency," and is unconstitutional under *Container*, for failure of apportionment.

Despite this failure, the State argued below that the tax *was* apportioned because (a) the tax is limited to calls that are charged to an Illinois service address, and (b) the tax is limited to calls involving an Illinois purchaser of or participant in the interstate call. Neither of these arguments is tenable under the external consistency test, however. For example, the limit of the tax to calls charged to an Illinois address in no way segregates out and taxes that portion of Illinois transmission activity and costs involved in a long distance call, while protecting substantial non-Illinois transmission activity and costs from taxation. If a call originates in Illinois and is charged to an address there, Illinois taxes the entire gross charge for the call, regardless of the substantial economic support provided the call by the other state(s) on the call's transmission path. The Illinois charge limit is therefore an economically arbitrary limit on the tax, insufficient to apportion and validate it. *Central Greyhound Lines, Inc. v. Mealey*, 266 A.D. 648, 44 N.Y.S.2d 652, 654 (App. Div. 1943), *aff'd*, 296 N.Y. 18, 68 N.E.2d 855 (1946), *rev'd*, 334 U.S. 653 (1948) (New York tax on interstate bus transportation deemed objectionable even though the tax was limited to those receipts collected by the bus company in New York).

As to the argument that the Illinois tax is apportioned because limited to calls involving an Illinois participant or purchaser, the same reasoning applies. Confining the tax to those calls involving an Illinois participant or caller would still not identify that percentage of instate transmission activity and costs involved in each long distance call, and confine the Illinois tax to the corresponding percentage of the call's gross charge. Therefore, the State's arguments are misdirected, and the tax utterly fails the external consistency test.[11]

3. The Unapportioned Tax Cannot Be Valid under the Commerce Clause because Its Failure To Apportion Constitutes Discrimination

The Illinois Supreme Court rejected the State's argument that the Illinois tax is apportioned. Goldberg J.S. App. C at 4a. It nevertheless upheld the tax on the ground that apportionment of a tax is not required, as long as it otherwise avoids discrimination. That conclusion was inconsistent with this Court's decisions in two respects. First, in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), this Court expressed the Commerce Clause tests for taxes on interstate activity in the conjunctive; hence, the apportionment test cannot be simply eliminated. Second, this Court has held that the failure of a tax to apportion itself to instate activity itself portends prohibited discrimination. *Armco Inc. v. Hardesty*, 467 U.S. 638, 644 (1984) ("A tax that unfairly apportions income from other States is a form of discrimination against interstate commerce").[12]

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[11] Indeed, it is not certain that either an Illinois participant or purchaser will be involved in all calls taxed by Illinois. A taxed call could, for instance, be charged to an Illinois address and still not involve a participant in Illinois, if the call were charged by card. Further, as already shown, the taxed calls are not necessarily billed or paid for in Illinois.

[12] This Court has suggested elsewhere that one of the Commerce Clause tax tests cannot substitute for another. *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 399 (1984). It appears, then, that nondis-

(Footnote continued on the following page)

Furthermore, the Illinois court advanced no tenable argument for dismissing the apportionment requirement, as its flawed reasoning and citation of inapposite precedent demonstrate. For example, the court's reliance on *Wisconsin Telephone Co. v. Wisconsin Department of Revenue*, 125 Wis. 2d 339, 371 N.W.2d 825 (Ct. App. 1985), in which the court analyzed a tax on long distance messages and found apportionment unnecessary, was misplaced. In *Wisconsin Telephone*, the state court had construed the tax on long distance calls at issue as a tax on the local sale of such calls. Since the tax was deemed local, the court concluded that apportionment was irrelevant. *Wisconsin Telephone*, 371 N.W.2d at 830. The Illinois court, by contrast, construed the Illinois tax as applied not to a local event, but to *interstate* activity, where apportionment is clearly necessary. The Illinois court thus erred by adopting the Wisconsin court's conclusion while rejecting the very premise upon which that conclusion rests.[13]

The Wisconsin Court's theory that apportionment is optional under the Commerce Clause has also been the subject of attack in recent analysis undertaken here. For example, the Wisconsin court relied heavily on this Court's validation of an unapportioned gross receipts tax in *General Motors Corp. v. Washington*, 377 U.S. 436 (1964), in concluding that an unapportioned tax is not *per se* unconstitutional. *Wisconsin Telephone*, 371 N.W.2d at 830. However, given this Court's recent disapproval of *General Motors* and its reliance on the dissenting opinion, the *dicta* in *General Motors*, to the effect that an unapportioned tax may be constitutional, is highly suspect. *See Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984); *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 107 S. Ct. 2810, 2816 (1987). *See also General Motors*, 377 U.S. at 450 (Brennan, J. dissenting, objecting to short shrift given to apportionment requirement). Recent developments in Commerce Clause state tax analysis appear to have fairly vitiated the force of *General Motors*, then, and suggest that, by eschewing the apportionment requirement, the Wisconsin and Illinois courts erred.

In sum, neither the Wisconsin decision, nor the *General Motors* case upon which it relied, present compelling authority for dismissing the apportionment requirement.[14] Further, as the facts show, dispensing with the apportionment requirement with regard to the tax at issue here would lead to pernicious results. Therefore, the Illinois tax, which is clearly unapportioned, should be struck down.

B. The Tax Violates the Commerce Clause because It Discriminates against Interstate Commerce

The purpose of the Commerce Clause is to create and protect free trade among the states. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 328 (1977) (as cited in *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984)). In light of this purpose, a fundamental Commerce Clause principle is that no state may impose a tax which discriminates against interstate commerce by providing an advantage to instate interests. *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981). This principle pro-

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12 *(continued)*

crimination is a necessary but not sufficient condition of a constitutional tax, contrary to what the Illinois Supreme Court held.

[13] The Wisconsin court's finding that this tax was assessed on local activity was in error, in any event. *See* discussion *supra* at 17-24. Even so, that finding also rested on the Wisconsin court's assumption that only one state's tax could ever be applied to a bill for a call. However true that may have been with regard to the Bell Operating Company involved there, GTE Sprint, by contrast, has the capability of billing more than one state's tax on one bill for the same phone call. *See* Statement of the Case, *supra* at 4 and discussion *infra*. *Cf. Wisconsin Telephone*, 371 N.W.2d at 830.

[14] The Wisconsin court also simply rejected or ignored the applicable multiple burden discrimination test set out in *Armco Inc. v. Hardesty*, 467 U.S. 638, 644 (1984). Since the state court relied, in part, upon its finding of no multiple burdens to dispense with the apportionment requirement, its analysis is even more questionable. *Wisconsin Telephone*, 125 Wis. 2d 339, 371 N.W.2d at 830.

hibits discrimination against interstate services, regardless of where the burden for such discrimination falls. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268-269 and n.8 (1984) (the Commerce Clause is violated even if instate and out-of-state taxpayers equally bear the brunt of discrimination against out-of-state products).

The Illinois Tax Act seriously discriminates against interstate calling activity or service in two ways. First, it creates potential and actual multiple taxation of the same interstate calling activity by Illinois and other states, while purely intrastate calling activity is not exposed to such multiple burdens. Second, the Illinois taxing scheme effectively taxes interstate calling more heavily than intrastate calling. Regardless of the validity of the Illinois Supreme Court's holding on apportionment, then, its decision that the tax is constitutional requires reversal, because the tax illegally discriminates against callers who call outside the state.

1. The Tax Discriminates by Imposing Multiple Burdens on Interstate Calls

a. The Tax Creates the Risk of Multiple Taxation

Taxes that create even a risk of multiple taxation on the same interstate activity are discriminatory and impermissibly burden interstate commerce. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 255-56 (1938); *International Harvester Co. v. Department of Treasury*, 322 U.S. 340, 360 (1944) ("the risk of multiple taxation creates the unconstitutional burden which actual taxation by [more than one state] would impose in fact"). This Court has recently reiterated and reinforced its position that a tax on interstate activity is void if hypothetical, "like" taxes could be imposed by other states on the same activity. *Armco Inc. v. Hardesty*, 467 U.S. 638, 644-45 (1984); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984).

Applying *Armco*, it is clear that the Illinois tax creates an impermissible risk of multiple taxation. The Illinois tax is applied to the total charge for the act or privilege of originating

or receiving an interstate call in Illinois, if the call is charged to an Illinois service address. But another state, let us say "New York," might pass a "like" tax on interstate calls originating or terminating and billed or paid for there. If a call were made from Illinois to New York, then, Illinois could tax the call because it begins in Illinois and could be charged to an Illinois address, but New York could also tax the call because the call terminates in the State of New York and the call, though charged to an Illinois address, might be either billed or paid for in New York.[14] As a consequence, the application of this hypothetical New York tax, together with the Illinois tax, results in multiple taxation of the same call. Such a risk of multiple taxation would be even greater if the hypothetical state's tax were not limited to calls paid or billed locally. Under the *Armco* hypothetical risk test, then, the Illinois tax is unconstitutional.

b. The Tax Creates Actual Multiple Taxation

Although a showing of actual multiple taxation of the same activity is not necessary to invalidate a tax on that activity under the Commerce Clause, such a showing surely dooms it. *See American Trucking Associations, Inc. v. Scheiner*, 107 S. Ct. 2829, 2841 (1987). As this Court has stated, "[i]f another State has taxed the same interstate transaction, the burdensome consequences to interstate trade are undeniable." *Armco Inc. v. Hardesty*, 467 U.S. 638, 645 n. 8 (1984). Here, it is undeniable that the Illinois tax unduly burdens interstate commerce since jurisdictions other than Illinois are already applying *actual* taxes on the very calls taxed by Illinois.

Several states and municipalities have levied taxes on interstate telecommunications services which, when combined with the Illinois tax, produce multiple taxation of the same activity.

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[14] For example, a call might be *charged* to a phone at the Illinois division of a New York corporation, but the bill *paid* at corporate headquarters in New York.

As examples:[15]

(1) The State of Washington imposes a tax on the "privilege" of engaging in interstate phone calls. Wash. Rev. Code Ann. §§ 82.04.065 and 82.04.250 (Supp. 1988); Sprint J.S. App. G at 17a-19a. Washington's tax is applied to the gross proceeds from all long distance calls originating or terminating in that state, when such calls are billed or paid for there. As a consequence, a long distance call from Illinois to Washington and charged to an Illinois address, but billed or paid for in Washington, could be taxed by both Illinois and Washington. A number of other states have passed taxes on long distance calls similar to the Washington tax, which taxes cover calls originating or terminating and billed in the state, in some manner (*e.g.*, billed to an instate customer or user (Arkansas, Florida, Oklahoma); to an instate telephone number (Arkansas, New Mexico, Ohio, Texas); to an instate telephone (Minnesota); or to an instate account (New Mexico, Ohio)). *See* citations to and summary of these statutes in Appendix A hereto. The imposition of any of these taxes, together with the Illinois tax, results in duplicative taxation of the calls between Illinois and these states since Illinois taxes calls even when they are billed elsewhere.

(2) A Los Angeles, California Ordinance applies a tax to every person in the City of Los Angeles using and (apparently) paying for interstate telephone communication services in the City. Los Angeles, Cal., Ordinance No. 162586 (July 7, 1987). *See* App. D hereto. A call between Illinois and Los Angeles could thus be taxed by both if the call were charged to an Illinois service address and paid for in Los Angeles, as, for example, where a call is made and charged to an Illinois office of a business headquartered in Los Angeles, and the phone bill is paid at

[15] In its Jurisdictional Statement, GTE Sprint used taxes from the City of Wheat Ridge and the City of Greeley, Colorado in its multiple burden discussion. Since that time, these two taxes have been amended. The full text of the taxes, as amended, have been reprinted in the Appendices hereto as Appendix E and F.

headquarters.

(3) A number of other states have also imposed a tax similar to the Illinois tax on long distance calls, by imposing a tax on charges for "access service."[16] A charge for "access service" is a charge local carriers assess against interstate carriers for the privilege of allowing the interstate carriers to originate or terminate their interstate transmissions at the local level. *See* Statement of the Case at 4; Sprint J.S. App. C at 8a. Such services and charges are necessary and integral portions of the activity already covered by the Tax Act, as the Act itself states.[17] Therefore, taxes on access charges and the Illinois tax are "like" taxes, covering the same transmission activity. The concomitant existence of the access charge taxes and the Illinois Tax Act clearly produces actual, multiple taxation, however. To illustrate: The Illinois tax is assessed against the total charge for an entire interstate call originating in Illinois and charged to a service address in Illinois. If a call therefore originates in Illinois and terminates in Wisconsin -- where a tax on access charges is assessed -- Illinois will tax the consumer on his charge for the total interstate transmission while Wisconsin will tax the carrier on the access charge paid for the local transmission necessary simply to complete the very same call. Thus, when calls are made between Illinois and Wisconsin (or another state with

[16] Transaction, sales and/or use taxes are imposed by the following states upon charges for "access services:" Colorado, Colorado Emergency Retail Sales Tax Act of 1935, Colo. Rev. Stat. § 39-26-104(1)(c) (1982), interpreted in Revenue Bulletin 83-7, October 1983 (see App. C hereto) (imposes tax on interstate access charges); Michigan, *see MCI Telecommunication Corporation v. State of Michigan*, 136 Mich. App. 28, 355 N.W.2d 627 (1984) (use tax applies to purchase of access services by interstate carrier); Wisconsin, Wisconsin General Retail Sales Act, Wis. Stat. Ann. § 77.51(14) (m) (West Supp. 1987) (sales tax imposed upon transfers of services permitting the origination and termination of telephone messages). *See* App. A hereto.

[17] The Illinois Tax Act acknowledges that these services are integral parts of the taxed end-to-end interstate communications. Ill. Rev. Stat. ch. 120, § 2002(c).

an access charge tax), at least one end of the telephone transmission can be taxed twice, though the tax may be assessed on different taxpayers.[18]

The imposition of these various sales, privilege and access charge taxes, together with the Illinois tax, can and do bring about multiple taxation of the same calling activity. Under the Illinois Tax Act, Illinois has taxed the full stretch of an interstate transmission. But other states inevitably involved in the transmission of the same interstate call have a right equal to Illinois to assess taxes on their own instate portions of it, whether that entails the origination or receipt of the call, the partial transmission of the call, or aspects of its sale (*e.g.*, "billing and payment"). As a consequence, the Illinois tax creates actual multiple burdens anytime any one of these other states also imposes a tax -- no matter how limited -- on the same transmission.

The Illinois Supreme Court's reasoning in dismissing the multiple taxation problem posed by the Tax Act represents a serious misunderstanding of both the operation of the tax and precedent from this Court. For example, the Illinois court found that, with regard to those communications which *originate* in Illinois, no risk of multiple taxation exists. Goldberg J.S. App. C at 11a. But there is absolutely no evidence in the tax or the record -- nor none cited by the court -- which would support this conclusion. Indeed, to the contrary, GTE Sprint has submitted uncontested evidence here and below, in the form of actual taxes, establishing that the Illinois tax operates to impose multiple burdens on the calls taxed by Illinois, whether they begin or

[18] To the extent that the access charge taxes are assessed against the carriers, while the Illinois tax is assessed on consumers, this Court held long ago that the pertinent inquiry is whether or not the same *activity* is subject to multiple taxation, regardless of whether one or more persons or entities bear the burden of it. *Telegraph Co. v. Texas*, 105 U.S. 460, 465 (1882); *see also Maryland v. Louisiana*, 451 U.S. 725, 756-757 (1981). Furthermore, under the Illinois tax, the carriers are made equally liable for the tax, in any event, so that a carrier in Illinois *could* be liable for both taxes. *See* Statement of the Case at 9.

end in Illinois. *See* discussion *supra* at 36-38 and tax summary in App. A hereto.

Indeed, rather than examining the actual effect of the Illinois tax, the Illinois Supreme Court relied almost entirely on recent Wisconsin and Alaska state court cases upholding interstate telephone call taxes to support its position that calls originating in Illinois cannot be subject to multiple taxation. *See* Goldberg J.S. App. C at 11a; *Douglas v. Glacier State Telephone Co.*, 615 P.2d 580, 588 (Alaska 1980) ("*Douglas*"); *Wisconsin Telephone Co. v. Wisconsin Department of Revenue*, 125 Wis. 2d 339, 371 N.W.2d 825, 830 (Ct. App. 1985) ("*Wisconsin Telephone*"). These state courts' conclusions are not relevant to the issue of whether the Illinois tax is valid, however, for two reasons.

First, the Alaska court and Wisconsin court each construed its state's tax on long distance phone calls as a local "sales" tax and reasoned, therefore, that only one state (itself) could assess a tax on that local "sale." By contrast, the Illinois court found that the Illinois tax is *not* a tax on a local sale, but a tax on interstate calling activity. Goldberg J.S. App. C at 8a-9a. The Wisconsin and Alaska court decisions in no way support the Illinois court's conclusion, then, given the Illinois court's broader interpretation of its state's tax.

Second, the Alaska and Wisconsin courts assumed that their "sales" taxes could never create the possibility of multiple taxation on the same call, since, they surmised, only one bill with one tax would be sent to any one entity on a call. *Wisconsin Telephone*, 371 N.W.2d at 830. However, the Illinois tax taxes interstate calls which begin or end in Illinois and which are charged to an Illinois service address, *regardless of where they are billed or paid*. The Illinois tax applies, then, to situations where calls are charged and billed in two different locations. Furthermore, though the Alaska and Wisconsin courts had concluded that no carrier could assess any more than one state's tax on any one long distance call (under the local Bell Operating Company billing system that existed there then), GTE Sprint has submit-

ted uncontested evidence which demonstrates, that, by contrast, GTE Sprint could apply separate states' taxes on one interstate call bill. *See* Statement of the Case at 4. *Cf. Douglas*, 615 P.2d at 588; *Wisconsin Telephone*, 371 N.W.2d at 830. Thus, the Alaska and Wisconsin cases are no support whatsoever for the Illinois Supreme Court's analysis.[19]

Indeed, pertinent prior precedent points to a conclusion contrary to the one arrived at by the Illinois Supreme Court -- that the Illinois tax on long distance calls *originating* in Illinois can impose multiple tax burdens on the same activity. For example, in *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954) ("*Michigan-Wisconsin*"), Texas had imposed a tax on the "taking" of gas into an interstate pipeline for interstate transmittal -- that is, on the "origination" of the interstate flow. The Court struck down the tax because, if Texas could place a tax on the origination of the interstate flow of gas, so, too, could the state where the interstate flow was terminated. *Michigan-Wisconsin*, 347 U.S. at 170. Likewise, here, if Illinois is permitted to apply a tax on the gross charge for an interstate call beginning in Illinois, so, too, must the state where the call terminates. Indeed, many states, such as Washington, New Mexico, and Ohio, have enacted taxes which permit them to tax calls terminating there, even if originating and charged to an address in Illinois. *See* App. A hereto. As a consequence, the Illinois tax is unconstitutional under proper case authority, and the Wisconsin

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[19] In addition, the true underpinning of both the Alaska and Wisconsin courts' reasoning has simply been rejected by this Court. Both state courts had upheld the taxes at issue primarily because the plaintiffs had failed to demonstrate that the taxes at issue imposed *actual* multiple burdens. But, in *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), this Court categorically rejected this legal premise and held, instead, that actual multiple taxation need not be proven to invalidate a tax on interstate activity. The Wisconsin court also relied heavily on *General Motors Corp. v. Washington*, 377 U.S. 436 (1964) which has since been overturned or, at least, seriously eroded, in *Armco* and *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 107 S. Ct. 2810, 2817 (1987). *See* discussion *supra* at 32-33.

and Alaska state court decisions are inapposite to the issue here.

What is even more significant, however, is the fact that the Illinois Supreme Court simply conceded, after its extended analytical gyrations, that, with regard to long distance calls that end in Illinois, jurisdictions other than Illinois currently *do* tax those same calls.[20] The Illinois tax is patently void, then, by the Illinois Supreme Court's admission, because the imposition of the tax results in multiple taxation of interstate calls. *Armco Inc v. Hardesty*, 467 U.S. 638, 644-45 & n.8 (1984).

2. The Tax Discriminates despite the Credit Provision

The Illinois Supreme Court nevertheless managed to uphold the Illinois tax, by finding, with no discussion, that the credit provision in the Tax Act "cures" its admitted discriminatory effect. Under the Illinois credit provision, a taxpayer who has paid both Illinois' and another state's tax on the same call can receive a tax credit from Illinois in the amount of the other state's tax, but only if the taxpayer can prove (a) that a tax has already been paid on the same activity taxed by Illinois and (b) that the tax paid in the other state or states was "properly due." Examination of the actual operation of this credit mechanism reveals that it is no more than a snake-oil cure for multiple taxation, however, for discrimination persists, despite its operation.

To illustrate: If State X imposes a tax on the gross charge for a call made from State X to Illinois, at a rate of three percent, while Illinois imposes a tax on the gross charge for the same call as received in Illinois, at a rate of five percent, the fact that Illinois grants a credit to the taxpayer in the amount of three percent of the charge does not negate the fact that the charge for the call is still being taxed by State X *and* by Illinois, though the Illinois tax rate has now been effectively reduced to two percent.

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[20] Here, the court was absolutely on target. For example, under the Oklahoma tax cited above, calls terminating in and charged to an Illinois service address could be taxed by Oklahoma, if the calls originate in Oklahoma and are billed there. *See* App. A hereto.

Further, the reduction of the Illinois tax rate is constitutionally meaningless because the division of tax between State X and Illinois, which is thus accomplished by the Illinois credit mechanism, will be completely arbitrary, based not on the percentage of substantive interstate call activity that goes on in each state, but on the relative absolute amounts of the two states' respective taxes. Thus, in the above example, Illinois would effectively receive tax on two-fifths of the call and State X on three-fifths -- regardless of what percentage of the taxed interstate calling activity occurred in either state. Such an arbitrary adjustment simply produces two non-apportioned taxes out of one and effectively multiplies discrimination.

Indeed, following the example, it is only when State X *happens* to assess a tax in an amount which equals or exceeds the absolute amount of the Illinois tax that the Illinois credit actually eliminates discrimination, by eradicating the Illinois tax altogether. This "cure" is totally fortuitous, however, and does not systematically purge the Illinois tax of its discriminatory disease, because it depends entirely upon the random and relative amounts of conflicting states' tax rates. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 76 (1963) (Brennan, J., concurring) (operation of credit based on amount of other state's tax provides only "fortuitous" and inadequate elimination of Commerce Clause infirmities).[21] The credit therefore fails to rescue the tax under the Commerce Clause.

Further, even if the Illinois credit mechanism did provide a reliable process for eliminating discrimination, the efforts it requires of taxpayers to participate in this process are enormous. For example, the Illinois tax credit is provided only for taxpayers

[21] Furthermore, to validate such a credit mechanism would only encourage states' legislatures to pass the highest politically possible tax on long distance calling they could. That is, by setting a higher tax than its neighbor, a state might retain tax revenues for itself, after credit offsets. However, it is this type of inexorable hydraulic pressure on interstate taxing that this Court rejected in *American Trucking Associations, Inc. v. Scheiner*, 107 S. Ct. 2829, 2842 (1987).

who can prove they have already paid to another state a tax which is "properly due," and which covers the same activity covered by the Illinois tax. *See* Statement of the Case, *supra* at 5. But no clarification of what taxes are deemed 'properly due' or overlapping in their application is provided by the taxing statute. Given this vagueness and the fact that long distance calling is a quotidian event, such a procedure will place an enormous burden of proof on interstate callers, not borne by callers calling instate. *See* Goldberg J.S. at 25-26. This burden is a burden on interstate commerce, in itself.

The State nevertheless defended the credit provision below, arguing that the adoption by numerous states of allegedly similar credit provisions in their use and sales tax schemes proves the Illinois credit effectively eradicates discrimination. The adoption of credit provisions in sales/use tax schemes in no way proves the Illinois credit mechanism is constitutional, however. First, the use/sales tax scheme has been devised to ensure that a state can tax the "use" of tangible goods within its boundaries when the sale of such goods takes place outside its borders, and the sale has not or cannot be taxed by another state. *See generally, Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). However, this Court has never determined whether sales and use taxes apply to overlapping or identical activity nor whether a credit provision in a use tax, for a paid sales tax, would be necessary to cure multiple taxation created by the imposition of both taxes. *Williams v. Vermont*, 472 U.S. 14, 22 (1985); *Henneford*, 300 U.S. 577, 587 (1937). Thus, it is not altogether clear whether the use/sales tax scheme even represents an example of multiple taxation -- or whether the credit provision in any particular use/sales tax scheme serves to alleviate unconstitutional discrimination.

Second, the typical sales and use tax situation appears to present dynamics which render the operation of the credit provision in the Illinois tax significantly more burdensome to the taxpayer than its operation would be to a taxpayer subject to a use tax. For example, it is a well-known fact that states have a difficult time collecting use taxes from consumers, due to jurisdic-

tional problems they encounter in enforcing collection by out-of-state sellers. Advisory Commission on Intergovernmental Relations, Pub. No. A-105, *State and Local Taxation of Out-of-State Mail Order Sales* (April, 1986); P. Hartman, *Collection of the Use Tax on Out-of-State Mail Order Sales*, 39 Vanderbilt L. Rev. 993, 1003-1004 (1986). *Cf. National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967). Thus, if the use tax is rarely collected from consumers because of jurisdictional problems, then the vast majority of consumers liable under use taxes will not encounter actual multiple taxation problems with great frequency -- nor find the need to resort to the credit provision.

The Illinois tax operates in a radically different manner. The tax requires long distance message carriers to tax *all* calls and it is unlikely that interstate carriers whose business spans the United States will be able to refuse collection on the ground that a state does not possess jurisdiction over it.[22] No long distance caller covered by the Illinois tax, or any like tax, will escape taxation. The burden will thus fall entirely on the credit provision to correct multiple burden problems. Given the proliferation and frequency of interstate calls, this burden will be immense -- and the taxpayer who makes long distance calls will bear it all, for each and every call.[23] For the State to maintain, then, that the use tax credit provisions demonstrate the validity of the Illinois credit provision is folly. Under the Illinois tax, those who engage in long distance phone calling and attempt to utilize the credit will bear huge burdens of recovery not borne by instate callers. The credit provision in the Tax Act therefore does not eradicate and, indeed, exacerbates the discriminatory effects of the tax.

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[22] Indeed, the tax virtually assures the carriers will impose the tax by making them equally liable for it. *See* Statement of the Case at 9.

[23] *See* Goldberg J.S. at 25-27 and authorities cited therein. Further, unlike the use/sales tax situation where there are normally only two taxing states involved in any one tax credit situation, the activity at issue here could easily involve the taxes -- and credit provision interactions -- of numerous states.

3. The Tax Discriminates by Imposing Heavier Burdens on Interstate than on Intrastate Calls

The State of Illinois argued below that the Illinois tax could not be deemed "discriminatory" because the same or "equal" five percent tax was levied on both interstate and intrastate calls in Illinois. The gist of the argument is that the five percent tax on interstate calls is a "compensating" tax, *i.e.*, a tax that equalizes the tax burdens on intra- and interstate activities. *Cf. Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). The Illinois Supreme Court apparently agreed. Goldberg J.S. App. C at 11a. However, the Illinois tax on interstate calls cannot be justified as a tax which is either "equal" to the five percent tax on intrastate calls, nor one which "compensates" for it.

First, it does not follow that simply because a flat five percent tax is applied to both intra- and interstate calls, the tax does not discriminate against interstate commerce. Just last term, this Court struck down such a facially "equal" tax, stating: "[T]he Commerce Clause has a deeper meaning that may be implicated even though state provisions . . . do not allocate tax burdens between insiders and outsiders in a manner that is facially discriminatory." *American Trucking*, 107 S. Ct. at 2839. In *American Trucking*, an equal and flat tax was applied to trucks in both intra- and interstate commerce, for the privilege of utilizing Pennsylvania's highways. Despite this "equality" of taxing, the Court held that the interstate carriers were bearing a proportionately heavier tax burden than the instate carriers, because interstate carriers did not use instate facilities with nearly the frequency instate carriers did:

> Although out-of-state carriers obtain a privilege to use Pennyslvania's highways that is nominally equivalent to that which local carriers receive, imposition of the flat taxes for a privilege that is several times more valuable to a local business than to its out-of-state competitors is unquestionably discriminatory and thus offends the Commerce Clause.

American Trucking, 107 S. Ct. at 2847. Similarly, the allegedly

"equal" Illinois tax is proportionately higher on interstate than on intrastate calls, because interstate calls do not utilize instate facilities for calls as extensively as instate calls do, as GTE Sprint has demonstrated by uncontested fact. *See* Statement of the Case at 3-4. The interstate tax is therefore not "equal" to the instate tax. *American Trucking*, 107 S. Ct. at 2846.

Second, the tax on interstate calls does not merely "compensate" for the imposition of the five percent tax on instate calls, under the "compensating tax" doctrine. As this Court has stated, "[t]he concept of a compensatory tax first requires identification of the burden for which the state is attempting to compensate." *Maryland v. Louisiana*, 451 U.S. 725, 758 (1981). Here, the only burden for which the Illinois tax is arguably compensating is the burden of supporting calling or transmission activity. But the burden on Illinois of supporting interstate calling is nowhere near its burden of supporting instate calls because *all* the activity involved in instate calling will occur in Illinois, whereas only part of it will with regard to interstate calls. Thus, the two different events -- instate and interstate calling -- do not impose comparable burdens on the State, and are not, under the compensating tax doctrine, "substantially equivalent event[s]." *Armco*, 467 U.S. at 643. The flat five percent tax on both intra- and interstate calling in the Tax Act does not fall equally on the two. Instead, it overcompensates Illinois for the burdens interstate transmission places on the state, because Illinois' burden is lighter with regard to such transmission. The result is that "[r]ather than 'compensating' [Illinois] for a supposed . . . disadvantage . . . the [Illinois tax] . . . creates . . . both an advantage for [Illinois instate callers] . . . and a discriminating burden on commerce to its sister States." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 331 (1977). *See also Tyler Pipe*, 107 S. Ct. 2810, 2818 (1987). Since "[t]he common thread through the cases upholding compensatory taxes is the equality of treatment between local and interstate commerce," it is clear the Illinois five percent/five percent tax scheme cannot be justified under the "compensatory tax" doctrine. *Maryland v. Louisiana*, 451 U.S. at 759; *American*

Trucking, 107 S. Ct. at 2846.[24]

C. The Tax Violates the Commerce Clause because It Is Not Fairly Related to Services Provided by Illinois

A state tax on interstate activity must be "fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). GTE Sprint argued below that the Illinois tax failed this fourth *Complete Auto* test. The Illinois Supreme Court disagreed, concluding that "the services provided by [Illinois] facilitate perhaps the most critical step in the taxable event -- interstate origination . . . [while] . . . the benefits afforded by other States in facilitating the same interstate telecommunication are too speculative to override the substantial benefits extended by Illinois." Goldberg J. S. App. C at 13a (emphasis added). This assumption has no basis in fact, however, as uncontroverted evidence submitted below establishes the highly significant role of states other than Illinois in facilitating interstate telecommunications, even where they begin in Illinois. *See* Statement of the Case at 3-4; Sprint J.S. App. C at 7a-8a.

There is also no legal basis for concluding that the Illinois tax has any fair relation to the services Illinois provides the taxed activity. The fair relation test requires that:

> [t]he *measure* of the tax must be reasonably related to the extent of the [activity's] contact [with the taxing

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[24] In this respect, the Illinois intra- and interstate tax scheme is totally different from a use/sales tax "compensatory" scheme which applies to tangible personal property that is sold entirely in one state and is then entirely consumed within another. *Cf. Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). Interstate service simply does not represent a distinguishable and totally out-of-state counterpart to some totally instate activity, as the "use" of a product outside a state may be the counterpart to the sale of it within another. Therefore, although the sales/tax scheme may provide that "the stranger from afar is subject to no greater burdens . . . than the dweller within the gates," this is certainly not the case here. *Henneford*, 300 U.S. at 584.

> state], since it is the activities or presence of the taxpayer in the State that may properly be made to bear a 'just share of the state tax burden. [T]he incidence of the tax *as well as its measure* [must be] tied to the earnings which the State . . . has made possible. . . .'

Commonwealth Edison Co. v. Montana, 453 U.S. 609, 626 (1981) (emphasis in text) (citations omitted). But the measure of the Illinois tax is not tied to the earnings or charges which Illinois has made possible with regard to interstate calling. As GTE Sprint proved by uncontested affidavit, interstate calling involves significant transmission activities outside Illinois, which activities are economically supported by other states. *See* Statement of the Case at 3-4 . The Illinois tax applies to the full stretch of every interstate call, however, though the activity taxed has only partial presence in, and is only partially supported by, Illinois.

In this respect, the infirmity of the Illinois tax strongly resembles the flaw of the flat privilege tax on interstate carriers, struck down in *American Trucking Associations, Inc. v. Scheiner*, 107 S. Ct. 2829 (1987). There, the Court stated that:

> A tax levied for the privilege of using roads, and not their actual use, may, in the normal course of operations, and not as a fanciful hypothesis, involve an undue burden on interstate carriers. While the privilege extended by a State is . . . theoretically the same for all vehicles, whether interstate or intrastate, the intrastate vehicle can and will exercise the privilege whenever it is in operation, while the interstate vehicle must necessarily forego the privilege some of the time simply because of its interstate character, *i.e.*, because it operates in other states as well. In the general average of instances, the privilege is not as valuable to the interstate as to the intrastate carrier.

American Trucking, 107 S. Ct. at 2844 (citations omitted). Likewise, here, the privilege Illinois accords interstate callers is worth significantly less than that afforded instate callers because instate callers use Illinois facilities and lines more frequently. The Illinois tax, which taxes both equally, therefore "bears no relationship to the taxpayers' presence or activities in [the] State. . . ." *American Trucking*, 107 S. Ct. at 2844; *Nippert v. Richmond*, 327 U.S. 416 (1946) (flat tax on solicitors whether operating intra- or interstate bore no relation to volume of instate business done or returns from it).

Indeed, the Illinois tax is even less 'fairly related' and is, therefore, more insidious than the tax the Court invalidated in *American Trucking*, because the Illinois tax tends to tax a call *more* heavily, the *less* the call involves instate activity. As the uncontested facts show, calls made over greater distances tend to cost more and GTE Sprint (therefore) tends to charge more for such calls. The further tendency is that, the greater the distance of a call touching Illinois, the more out-of-state or non-Illinois activity it involves. *See* Statement of the Case at 3-4 . But, because Illinois receives a flat five percent on the gross charge for calls, Illinois tends to receive more revenue on calls the longer -- and more expensive -- they are and, therefore, the more they involve activity outside the State of Illinois. *See* Sprint J. S. App. C at 8a-9a. The tax therefore operates in direct contradiction to the dictates of the fair relation rule because there is an inverse relationship between the amount of Illinois activity involved in a long distance call and the measure of the Illinois tax. This insidious inverse relationship assures that the Illinois tax is out of all proportion to the extent of the taxpayers' activities in Illinois -- and that it is unconstitutional under established Commerce Clause principles. *See American Trucking*, 107 S. Ct. 2829, 2844 (1987); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 627-29 (1981).

CONCLUSION

The judgment of the Illinois Supreme Court that the Illinois Tax Act is constitutional under the Commerce Clause was in error. The court's judgment should therefore be reversed.

Respectfully submitted,

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April 29, 1988

APPENDICES

APPENDIX A

SUMMARY OF SELECTED EXISTING TAXES ON INTERSTATE TELECOMMUNICATIONS ACTIVITY

Arkansas Gross Receipts Act of 1941, Ark. Stat. Ann. § 26-52-301 (Supp. 1987), effective February 11, 1987 (taxing interstate long distance messages which originate or terminate in Arkansas and are billed to an Arkansas telephone number or customer location).

Colorado Emergency Retail Sales Tax Act of 1935, Colo. Rev. Stat. § 39-26-104(1)(c) (1982), interpreted in Revenue Bulletin 83-7, October 1983 (imposes tax on interstate access charges).

Florida Revenue Act of 1949, Fla. Stat. Ann. § 212.05 (1)(e)2 (West Supp. 1988), effective July 1, 1986 (taxing telecommunications services which originate or terminate in Florida and are billed to a customer, telephone number, or device in Florida and, with regard to interstate private line communication services, taxing only that percentage of the service charge corresponding to the percentage of total call mileage within the state).

Greeley, Colorado City Ordinance No. 45, effective July 1, 1985 (taxing interstate telecommunications services originating from or received on telecommunication equipment in Greeley if the charge for the service is billed or charged to an apparatus, telephone, or account in Greeley, or to a customer location in Greeley, or to a person residing in Greeley).

Los Angeles, California Ordinance No. 162586, effective July 7, 1987 (taxing every person using and paying for interstate telephone exchange services in the City of Los Angeles).

Minnesota Tax Reform and Relief Act of 1967, Minn. Stat. Ann. § 297A.01. subd. 3(f) (West Supp. 1988), effective June 1, 1987 (taxing interstate toll service originating in Minnesota and charged to a telephone located in Minnesota).

New Mexico Gross Receipts and Compensating Tax Act, N.M. Stat. Ann. §§ 7-9-3(F); 7-9-4; 7-9-56 (1986 Repl.), effective July 1, 1988 (taxing interstate and international messages or conversations that originate or terminate in New Mexico and are billed to a New Mexico telephone number or account).

Ohio Sales Tax Act, Ohio Rev. Code Ann. § 5739.01 (B)(3)(f) (1987 Supp., p. 67), effective October 20, 1987 (taxing telecommunications service originating or terminating in Ohio and charged to the consumer's telephone number or account in Ohio).

Oklahoma Sales and Use Tax, Okla. Stat. Ann. tit. 68, § 1354(D) (West Supp. 1988), interpreted by Oklahoma Tax Commission Order No. 83-01-10-06, effective January 10, 1983 (taxing sale of all long distance calls which originate in Oklahoma and where calls are billed to Oklahoma subscribers or users).

Texas Limited Sales, Excise, and Use Tax Act, Tex. Tax Code Ann. § 151.323(1) (Vernon Supp. 1988), effective November 1, 1987 (taxing receipts from the sale, use or consumption in Texas of long-distance telecommunications services that are originated from and billed to a telephone number or billing or service address within Texas).

Washington Revenue Act of 1935, Wash. Rev. Code Ann. § 82.04.065(2) (Supp. 1988), effective July 1, 1983 (taxing interstate telecommunications service originating or terminating in Washington and billed to a person in Washington).

Wheat Ridge, Colorado Ordinance No. 630, effective August 27, 1985 (taxing interstate telecommunications services charged to an apparatus, telephone, or account in Wheat Ridge, or to a customer location within Wheat Ridge, or to a person residing in Wheat Ridge).

Wisconsin General Retail Sales Tax Act, Wis. Stat. Ann. § 77.52(2)(a)(4) (West Supp. 1987), effective May 1, 1982 (taxing interstate service originating in Wisconsin and charged to a telephone located in Wisconsin).

Wisconsin General Retail Sales Tax Act, Wis. Stat. Ann. § 77.51(14)(m) (West Supp. 1987) (sales tax imposed upon transfers of services permitting the origination and termination of telephone messages).

APPENDIX B

BEFORE THE OKLAHOMA TAX COMMISSION

STATE OF OKLAHOMA

IN THE MATTER OF THE AMENDMENT TO ORDER NO.'S 82-12-21-01 AND 82-12-13-03 REGARDING THE APPLICATION OF THE SALES TAX IN THE SALE OF LONG DISTANCE TELEPHONE SERVICE.	Ref. 82-12-21-01 82-12-13-03

ORDER NO. 83-01-10-06

This matter comes on before the Oklahoma Tax Commission upon the various Motions to vacate, stay and reconsider the captioned Orders and upon the request of the Sales and Use Tax Division and the Legal Division for an Order vacating Orders Numbered 82-12-21-01 and 82-12-13-03 and for a new order applicable to the various telephone companies, operating within the State of Oklahoma, concerning the application of the Oklahoma sales tax on the sale of long distance telephone service. The Commission proceeded to review the files and records in this matter, hear recommendations of the Sales and Use Tax Division and advice of legal counsel, and the arguments of various telephone companies which were represented by Bill Anderson, William Free and Ron Comingdeer, being considered and being fully advised in the premises, finds:

(1) Title 68 O.S. 1981, Section 1354, Subsection (D) imposes Oklahoma sales tax upon the sale of service provided by a telephone company including local and long distance service as follows:

Title 68 O.S. 1981, Section 1354:

"There is hereby levied upon all sales, not otherwise exempted in this article, an excise tax of 2% of the gross receipts or gross proceeds of each sale of the following:

(D) Service by telephone or telegraph companies to subscribers or users, including transmission of messages, whether local or long distance and all services and rental charges in connection with transmission of any message; . . . "

(2) "Telephone company", for purposes of this Order, means any person, firm, association, partnership, corporation or other legal entity who offer for sale within this state any telephone transmission service.

(3) "Originated within this state", for purposes of this Order, means any Long Distance Message Telecommunication Services ("long distance telephone service or calls" herein) which are sold to an Oklahoma subscriber or user within this state, including calls initiated in Oklahoma and terminated within or without Oklahoma and billed to the Oklahoma subscriber or user and calls initiated without Oklahoma and billed collect to a subscriber or user within Oklahoma.

(4) Although 68 O.S. 1981, Section 1354 provides for an excise tax of 2% of the gross receipts of the sale of service by telephone companies to subscribers or users, including transmission of messages, whether local or long distance, it appears from the files and records that said telephone companies collect, report and remit the excise tax only on all long distance telephone service, if the calls originate within this state and terminate within this state. But, some said telephone companies have failed, neglected or refused to collect, report and remit the excise tax on any and all long distance telephone services, if the calls originate within this state and terminate outside this state.

(5) The Oklahoma Sales Tax Code does not exempt said telephone companies from collecting, reporting, remitting or paying excise tax on the sale, within this state, of long distance telephone services billed to Oklahoma subscribers or users whether such long distance calls terminate or originate within or without this state.

(6) Certain telephone companies operating within the State of Oklahoma do not declare total gross receipts, both taxable and nontaxable, on Line 1 of the sales tax report, as required in §1365(A), nor do they identify all legal deductions on Lines 4A through 4G. The failure to report such information hinders an office audit determination of the proper amount of sales tax being reported, collected, remitted or paid. And this Commission is empowered and authorized to require sales tax reporters to furnish information necessary to compute the state sales tax by 68 O.S. 1981, §206, 243 and 1365.

Title 68 O.S. 1981, Section 1365, states in part:

> "(A) The tax levied hereunder shall be due and payable on the first day of each month, except as herein provided, by any person liable to remit or pay any tax due under this acticle. For the purpose of ascertaining the amount of the tax payable under this article, it shall be the duty of all tax remitters, on or before the 15th day of each month, to deliver to the Tax Commission, upon forms prescribed and furnished by it, sales tax reports signed under oath, showing the gross receipts or gross proceeds arising from all sales taxable or nontaxable under this article during the preceding calendar month. Such reports shall show such further information as the Tax Commission may require to enable it to compute correctly and collect the tax herein levied . . . "

(7) The Sales and Use Tax Division is currently reviewing the administration and enforcement of Subsection D of §1354 as to applicability of Oklahoma sales tax upon all sales of all types of various services by telephone companies in Oklahoma; and, the Division is currently engaged in field audits of one or more of said telephone companies regarding all such telephone services sold within this State.

(8) This Order should not in any way or manner be construed to limit, restrict or negate the current efforts of the Sales and Use Tax Division, but rather, this Order should be limited to and only applicable to the administration and enforcement of sales tax on the sale of long distance telephone services to Oklahoma subscribers or users.

(9) Order No.'s 82-12-21-01 and 82-12-13-03 should be vacated and all telephone companies shall be bound by the findings herein set forth.

NOW, THEREFORE, IT IS HEREBY ORDERED by the Oklahoma Tax Commission, effective with the date of this Order, that Orders numbered 82-12-13-03 and 82-12-21-01 be, and hereby are, vacated and of no force and effect.

IT IS FURTHER ORDERED by the Oklahoma Tax Commission, that all telephone companies doing business within the State of Oklahoma are ordered to collect, report, remit, or pay to the Sales and Use Tax Division of the Oklahoma Tax Commission the 2% sales tax levied in 68 O.S. 1981, Section 1354 and imposed upon the sale of all long distance telephone services originated within this State and billed to Oklahoma subscribers or users, without regard to whether the billed, long distance telephone calls terminate within or without this state.

IT IS FURTHER ORDERED by the Commission that each and every telephone company doing business within the State of Oklahoma, with 68 O.S. 1981, Section 1365(A), in its monthly sales tax report Form 13-15, shall properly identify total gross receipts, both taxable and nontaxable, and appropriate statutory deductions, all as set out in the Commission approved Form 13-15.

IT IS FURTHER ORDERED that the Sales and Use Tax Division shall notify the telephone companies operating within this State that Oklahoma state sales tax and any applicable municipal sales tax will immediately be collected, reported, and remitted or paid on all long distance telephone services originated within this State and billed to Oklahoma subscribers or users on all bills dated no later than February 15, 1983 and all subsequent billings for such services to Oklahoma subscribers or users.

DATED this JAN 10 1983.

OKLAHOMA TAX COMMISSION

SEAL

ATTEST:

/s/ MARY JANE SINCLAIR
Assistant Secretary

/s/ ODIE A. NANCE
Odie A. Nance
Chairman

APPROVED:

/s/ HAROLD W. DOZIER
Harold W. Dozier, Director
Sales and Use Tax Division

/s/ ROBERT L. WADLEY
Robert L. Wadley,
Vice-Chairman

APPROVED AS TO FORM:

/s/ J. LAWRENCE BLANKENSHIP
J. Lawrence Blankenship
General Counsel

/s/ J. L. MERRILL
J. L. Merrill,
Secretary-Member

/s/ DONNA E. COX
Donna E. Cox, Attorney

APPENDIX C

[COLORADO]

REVENUE BULLETIN
83-7
OCTOBER - 1983

Issue: Are "carrier access charges" and "customer access line charges" (i.e. telephone service rate charges to interexchange carriers and local telephone subscribers) subject to Colorado sales tax?

Dept. Position: Both "carrier access charges" and "customer access line charges" are subject to Colorado sales tax pursuant to the provisions of C.R.S. 39-26-104(1)(c). Under this section, a Colorado sales tax is to be levied upon all intrastate telephone service. It is the Department's position that the services being provided for which "carrier access charges" and "customer access line charges" are assessed constitute "intrastate telephone service" and are therefore taxable.

APPENDIX D

[LOS ANGELES, CALIFORNIA]

ORDINANCE NO. 162586

An ordinance amending the Telephone Users Tax to include charges for interstate and international calls in the measure of tax.

THE PEOPLE OF THE CITY OF LOS ANGELES DO ORDAIN AS FOLLOWS:

Section 1. Subsection (a) of Section 21.1.3 of the Los Angeles Municipal Code is hereby amended to read as follows:

(a) There is hereby imposed a tax upon every person in the City of Los Angeles using telephone communication services including services for intrastate, interstate, or international calls, and using any teletypewriter exchange services in the City of Los Angeles. The tax imposed by this section shall be at the rate of 5 percent of the charges made for such services and shall be paid by the person paying for such services. Interstate calls shall be deemed to include calls to the District of Columbia.

Sec. 2. The first sentence of subsection (c) of Section 21.1.3 of the Los Angeles Municipal Code is hereby amended to read as follows:

The tax imposed in this section shall be collected from the service user by the person providing the telephone communication services or the teletypewriter exchange services.

Sec. 3. Subsection (d) of Section 21.1.3 of the Los Angeles Municipal Code is hereby amended to read as follows:

(d) Notwithstanding the provisions of Subsection (a), the tax imposed under this section shall not be imposed upon any person for using telephone communications services or teletypewriter exchange services, to the extent that the amounts paid for such services are exempt from or not subject to the tax imposed under Sec. 4251 of Title 26 of the United States Code, as such Section existed on November 1, 1967.

Sec. 4. Section 21.1.8 of the Los Angeles Municipal Code is amended by adding subsection (c) thereto to read as follows:

(c) The duty to collect the tax based on a measure including charges for interstate and international communication services or interstate and international teletypewriter exchange services shall commence with the first regular billing period of each service user ending on or after October 1, 1987.

Sec. 5. Any portion of Section 21.1.3(a), or of the first sentence of Section 21.1.3(c), or any portion of Section 21.1.3(d), or of Section 21.1.8(c) of the Los Angeles Municipal Code as amended by either Ordinance No. 162, 422 or Ordinance No. 162, 522 or both, and inconsistent with this ordinance shall have no force or effect after June 28, 1987.

Sec. 6. The City Clerk shall certify to the passage of this ordinance and cause the same to be published in some daily newspaper printed and published in the City of Los Angeles.

I hereby certify that the foregoing ordinance was introduced at the meeting of the Council of the City of Los Angeles of June 30, 1987 and was passed at its meeting of July 7, 1987.

Approved **July 7, 1987** ELIAS MARTINEZ, City Clerk

By: /s/ KYLE TAYLOR
deputy

File No. **87-0838-51** /s/ TOM BRADLEY
Mayor

APPENDIX E

[AMENDMENT TO ORDINANCE NO. 630
OF THE CITY OF WHEAT RIDGE, COLORADO]

[*See* GTE Sprint J.S. App. E at 14a-15a]

Telecommunications Service: "Telecommunications Service" means the transport of signs, signals, writing, images, sounds, messages, data, or other information of any nature by wire, radio, light waves, electromagnetic, digital, or electronic means, except carrier access services or interstate private communication services as defined herein.

Private Communication Service: "Private Communication Service" means:

(1) The communication service furnished to a subscriber which entitles the subscriber:

(A) to exclusive or priority use of any communication channel or groups of channels, or

(B) to the use of an intercommunication system for the subscriber's stations,

regardless of whether such channel, groups of channels, or intercommunication system may be connected through switching as herein described,

(2) Switching capacity, extension lines and stations, or other associated services which are provided in connection with, and are necessary or unique to the use of, channels or systems described in paragraph (1), and

(3) The channel mileage which connects a telephone station located outside a local telephone system area with a central office in such local telephone system,

except that such term does not include any communication service unless a separate charge is made for such service. . . .

(b) There shall be levied a tax upon the sale of telecommunications services, whether furnished by public or private corporations or enterprises for all intrastate, interstate and international telecommunications service charged to an apparatus, telephone, or account in Wheat Ridge, or to a customer location within Wheat Ridge, or to a person residing in Wheat Ridge, without regard to where the bill for such service is physically received. For purposes of this section, "telecommunications service" includes the installation of any telecommunications equipment or apparatus. A credit shall be allowed to the extent provided in Section 21-11(d) for any telecommunications services subject to the tax herein that are also subject to a sales tax outside of this City. . . .

(11) "Carrier Access Services" by local telephone exchange companies to providers of telecommunication service for use in providing such service shall be deemed to be wholesale sales and shall be exempt from taxation under this section.

APPENDIX F

[GREELEY, COLORADO MUNICIPAL CODE
TITLE 4
CITY RETAIL SALES AND USE TAX ORDINANCE]

4.04.005 Short title. This chapter, together with Chapters 4.08 and 6.08, may be known and cited as the "City Retail Sales and Use Tax Ordinance"....

4.04.015 Definitions. A. "Access services" means any charge by local telephone exchange companies to providers of telecommunications services for use in providing their telecommunications services....

U. "Telecommunications services" means the transport of signs, signals, writings, pictures, images, sounds, messages, data, or other information of any nature by wire, radio, light waves, electromagnetic, digital, or electronic means, except carrier access services or interstate private communication services....

4.04.060 Sales tax--Levied. There is levied and there shall be collected and paid a sales tax in the amount stated in Section 4.04.145 as follows....

E. Upon telecommunications services, except carrier access services and interstate private communication services as designated in Section 4.04.015U, whether furnished by public or private corporations or enterprises for all interstate, intrastate, and international telecommunications services originating from or received on telecommunications equipment in Greeley if the charge for the service is billed or charged to an apparatus, telephone, or account in Greeley, or to a customer location in Greeley, or to a person residing in Greeley, without regard to where the bill for such service is physically received....

4.04.065 Sales tax--Imposed on full purchase price. The sales tax is imposed on the full purchase price of articles sold after manufacture or after having been made to order and includes the full purchase price of materials used and service performed

in connection therewith, excluding, however, such articles as are otherwise exempted....

4.04.142 Sales tax--Credit for sales or use taxes previously paid to another municipality. For transactions consumated [sic] on or after January 1, 1986, the city's sales tax shall not apply to the sale of tangible personal property at retail or the furnishing of services if the transaction was previously subject to a sales or use tax lawfully imposed on the purchaser or user by another statutory or home rule municipality equal to or in excess of three percent. A credit shall be granted against the city's sales tax with respect to such transaction equal in amount to the lawfully imposed local sales or use tax previously paid by the purchaser or user to the previous statutory or home rule municipality. The amount of the credit shall not exceed three percent....

4.04.145 Sales tax--Amount designated. There is imposed, upon all sales of commodities and services specified in Section 4.04.060, a sales tax in accordance with the following schedule:

Amount of Sale	Sales Tax
\$0.00 to and including \$0.17	No tax
0.18 to and including 0.49	\$0.01
0.50 to and including 0.83	0.02
0.84 to and including 1.00	0.03

On sales in excess of one dollar, the tax shall be three cents on each full dollar of taxable sales, plus the tax shown in the above schedule for the applicable fractional part of a dollar of each such sale price....

4.04.150 Sales tax--Retailers and vendors to add tax to price or charges--Status of tax as debt--Nonresident retailers and vendors--Tax collection. Retailers and vendors shall add the tax imposed hereby, or the average equivalent thereof, to the sale price or charge, showing such tax as a separate and distinct item, and when added, such tax shall constitute a part of such price or charge and shall be a debt from the consumer or user

to the retailer until paid, and shall be recoverable by law in the same manner as other debts. Nonresident retailers and vendors engaged in business in the city shall collect and remit the sales tax as prescribed in this section. . . .